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No. 11947

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corpo-
ration,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

JUL 1 1948

PAUL P. O'BRIEN,
CLERK

No. 11947

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COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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ALFRED GITELSON

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Los Angeles 15, Calif.

For Appellee:

CATLIN & CATLIN

433 South Spring Street

Los Angeles 13, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

No. 44685-O'C

In the Matter of

COMMERCIAL WHOLESALERS, INC.,
a California corporation,

Alleged Bankrupt

PETITION IN INVOLUNTARY BANKRUPTCY

To the Honorable Judges of the United States District
Court, in and for the Southern District of California:

The petition of Herman R. Holsborg, Goldie W. Holsborg and Jack Wolman, respectfully represents:

I.

That Commercial Wholesalers, Inc. is a corporation duly organized under the laws of the State of California, and has had its principal place of business at 7358 Beverly Boulevard, City of Los Angeles, County of Los Angeles, State of California, in said judicial district for a longer portion of the six months immediately preceding filing of this petition than in any other judicial district, and owes debts to the amount of \$1000.00 or more, and is a business corporation, and is not a municipal, railroad, insurance or banking corporation, or building and loan association, and is insolvent, and is not a wage earner nor a person engaged in farming or tillage of the soil, but was engaged as a wholesale jobber of household appliances.

II.

That your petitioners are creditors of said Commercial [2] Wholesalers, Inc., having provable claims amounting in the aggregate in excess of securities held by them in the sum of \$500.00 or more.

III.

That the nature and amount of your petitioners' claims are as follows:

That the claim of Herman R. Holsborg is for moneys loaned to the alleged bankrupt within two years last past, represented by promissory notes due on demand, with interest at 6% upon which there is due and owing from the said alleged bankrupt to the said Herman R. Holsborg, the sum of \$29,621.68, no part of which sum has been paid.

That the claim of Goldie W. Holsborg is for moneys loaned to the alleged bankrupt within two years last past, represented by promissory notes due on demand, with interest at 6% upon which there is due and owing from the said alleged bankrupt to the said Goldie W. Holsborg, the sum of \$31,000.00, and upwards, no part of which sum has been paid.

That the claim of Jack Wolman is for moneys loaned to the alleged bankrupt within two years last past, represented by promissory note due on demand, with interest at 6% upon which there is due and owing from the said alleged bankrupt to the said Jack Wolman, the sum of \$8000.00, and upwards, no part of which sum has been paid.

IV.

That your petitioners further represent that the said Commercial Wholesalers, Inc. did, within four months next preceding the date of the filing of this petition, commit an act of bankruptcy in that it did heretofore, to wit, within four months from the date of the filing of this petition, transfer, while insolvent, a portion of its property, namely, money, to one of its creditors, Metal Service, Inc. and/or Jack Stein, in the sum of \$8750.00, with intent to prefer said Metal Service, Inc. and/or Jack Stein over its other creditors. [3]

Wherefore your petitioners pray that service of this petition, with subpoena, may be made upon the said alleged bankrupt, as provided in the Acts of Congress relating to bankruptcy, and that the said alleged bankrupt may be adjudged by this court to be a bankrupt within the purview of said Acts.

HERMAN R. HOLSBORG
GOLDIE W. HOLSBORG
JACK WOLMAN

FRANCIS F. QUITTNER and
ROBERT E. ROSSKOPF

By Francis F. Quittner

Attorneys for Petitioning Creditors [4]

[Verifications.]

[Endorsed]: Filed Dec. 31, 1946. Edmund L. Smith,
Clerk. [5]

[Title of District Court and Cause]

PETITION FOR ARRANGEMENT UNDER SECTION 321 IN PENDING BANKRUPTCY

To the Honorable J. F. T. O'Connor, Judge of the United States District Court for the Southern District of California, Central Division:

The petition of Commercial Wholesalers, Inc., a business corporation having its principal place of business at 7358 Beverly Blvd., in the City of Los Angeles, County of Los Angeles, State of California, and engaged in the business of stock wholesale jobbing, respectfully represents:

I.

That your petitioner is a business corporation organized and existing under and by virtue of the laws of the State of California, and is a corporation which could become a bankrupt under the Acts of Congress relating to Bankruptcy, and is not a municipal, railroad, insurance or banking corporation, or a building and loan association. [6]

II.

A proceeding in bankruptcy in which your petitioner is the alleged bankrupt entitled "In the Matter of Commercial Wholesalers, Inc., a California corporation, alleged bankrupt", In Bankruptcy No. 44685-O'C, is pending in this Court.

III.

That within six years next preceding the filing of this petition your petitioner has not been known and has not conducted any business by or under any assumed, trade or other name or designation, save and except that your petitioner was formed to take over the assets and liabilities of

Allied Wholesale & Distributing Co., a co-partnership composed of Frederick I. Frischling, Ruth Meretz and Ruth Baker, which co-partnership was formed in August of 1944 and continued until its assets and liabilities were taken over by the debtor on or about October 10, 1946.

IV.

Your petitioner is unable to pay its debts as they mature.

V.

In accordance with Chapter XI of the Bankruptcy Act, your petitioner proposes the arrangement with its unsecured creditors, the provisions of which are hereinafter set forth in a Plan of Arrangement marked Exhibit "A" annexed hereto and by reference made a part hereof, and that a majority of the Board of Directors of your petitioner has duly authorized such action on its part, and the statements made thereon on its behalf. That said plan of arrangement is for the best interests of the creditors, is fair and equitable and feasible; your petitioner has not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and the said plan of arrangement is proposed in good faith and has not been made or procured by any means, promises, or acts forbidden [7] by the Bankruptcy Act. That petitioner is informed and believes, and upon such information and belief states that a majority in number and amount of the creditors of the petitioner will approve said plan of arrangement.

VI.

The Schedule hereto annexed, marked Schedule A and verified by your petitioner's oath contains a full and true statement of all of its debts, and so far as it is possible to ascertain, the names and places of residence of its

creditors, and such further statements concerning said debts as are required by the provisions of the Acts of Congress relating to bankruptcy.

VII.

The Schedule hereto annexed, marked Schedule B and verified by your petitioner's oath contains an accurate inventory of all of its property, real and personal, and such further statements concerning said property as are required by the provisions of said Acts.

VIII.

The Statement hereto annexed marked Exhibit I and verified by your petitioner's oath contains a full and true statement of all of its executory contracts as required by the provisions of said Acts.

IX.

The Statement hereto annexed and marked Exhibit II and verified by your petitioner's oath contains a full and true statement of its affairs as required by the provisions of said Acts.

Wherefore: Your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Acts of Congress relating to bankruptcy.

COMMERCIAL WHOLESALERS, INC.

By Frederick I. Frischling

Secretary and Treasurer of Said Corp.

Petitioner

ALFRED GITELSON

By Robert R. Ashton, of Counsel

Counsel for Petitioner [8]

[Verified.]

[Endorsed]: Filed Feb. 14, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 321 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on Feb. 14, 1947, before the said Court the petition of Commercial Wholesalers, Inc., a corporation, that he desires to obtain relief under Section 321 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hubert F. Laugharn, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Commercial Wholesalers, Inc., a corporation, shall attend before said referee on Feb. 21, 1947 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on February 14, 1947.

(Seal)

EDMUND L. SMITH

Clerk

By F. Betz

Deputy Clerk

[Endorsed]: Filed Feb. 14, 1947. Edmund L. Smith, Clerk. [10]

[Title of District Court and Cause]

ORDER GRANTING LEAVE TO PROPOSE
MODIFICATION OF ARRANGEMENT

Upon the annexed petition of Commercial Wholesalers, Inc., a California corporation, the above named debtor, praying that it be granted leave to propose a modification of the arrangement under Chapter XI of the Act of Congress relating to bankruptcy, heretofore proposed and filed by the debtor herein, and that this Court adjudge that said alteration and modification is duly proposed herein, and it appearing that no notice of a hearing thereof should be given, and no adverse interest having been represented, and sufficient reason appearing to me therefor, it is

Ordered that leave be, and it hereby is, granted to Commercial Wholesalers, Inc., the above named debtor, to propose an alteration and modification of said arrangement as set forth in that certain "First Amended Plan of Arrangement" which is annexed to the annexed petition of said debtor, and it is hereby

Adjudged that said alteration and modification and said arrangement as so altered and modified, a copy of which modified [11] arrangement is annexed to the annexed Petition of said debtor, are duly proposed herein.

Dated: May 5, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Nov. 24, 1947. Edmund L. Smith,
Clerk. [12]

[Title of District Court and Cause]

PETITION FOR LEAVE TO PROPOSE FIRST
AMENDED PLAN OF ARRANGEMENT

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy in the Above Entitled Cause:

The petition of Commercial Wholesalers, Inc., a California corporation, respectfully represents:

I.

Heretofore your petitioner filed herein a Petition for Arrangement under Section 321 of the Bankruptcy Act, proposing an arrangement under Chapter XI of the Act of Congress relating to bankruptcy. Petitioner expressly admits insolvency as alleged in the Involuntary Petition in Bankruptcy on file herein.

II.

That a meeting of creditors has been called herein pursuant to Section 334 of said Act, which meeting has been continued until May 5, 1947.

III.

Petitioner's original Plan of Arrangement has not as yet been confirmed. [13]

IV.

Paul W. Sampsell has heretofore been appointed Receiver of your petitioner. No statutory committee of creditors has been appointed herein.

V.

A substantial number of the creditors of your petitioner have objected to and refused to consent to the original Plan of Arrangement proposed by your petitioner, and

your petitioner therefore desires to propose an alteration or modification of said arrangement, so as to eliminate the features of said arrangement which are objectionable to said creditors.

VI.

A true and correct copy of the arrangement as thus altered and modified is annexed hereto, marked "Exhibit A" and made a part hereof by reference, and entitled "First Amended Plan of Arrangement".

VII.

Your petitioner has made definite arrangements to obtain the cash which would be required under the provisions of the First Amended Plan of Arrangement, and said First Amended Plan of Arrangement is fair and equitable.

VIII.

The aforesaid modification materially and adversely affects the interests of unsecured creditors of your petitioner, except those whose debts have priority.

IX.

No notice should be given of this application because no acceptance heretofore obtained will be deemed to be an acceptance of said modification, and of the arrangement as modified.

Wherefore, your petitioner prays that it be granted a leave to propose said alteration and modification of said arrangement; that this Court adjudge that said alteration and modification and [14] the arrangement as so modified

are duly proposed herein; and that your petitioner have such other and further relief as is just.

COMMERCIAL WHOLESALERS, INC.

By Frederick I. Frischling

Secretary and Treasurer

Petitioner

ALFRED GITELSON

By Robert R. Ashton, of Counsel

Attorney for Petitioner

Paul W. Sampsell, Receiver herein, by and through his attorneys of record does hereby waive notice of hearing of the within petition.

CRAIG & WELLER

By Frank C. Weller

Attorneys for Receiver

“EXHIBIT A”

In the District Court of the United States

Southern District of California

Central Division

In the Matter of Commercial Wholesalers, Inc., a California corporation, Debtor. No. 44685-O’C.

FIRST AMENDED PLAN OF ARRANGEMENT

Commercial Wholesalers, Inc., a corporation, the above named debtor, proposes the following arrangement with its unsecured creditors:

INTRODUCTORY STATEMENT

I.

The debtor, Commercial Wholesalers, Inc., a California corporation, was incorporated under the laws of the

State of California on or about September 11, 1946, its authorized capital being twenty five hundred (2500) shares of common capital stock of a par value of One Dollar (\$1.00) per share. The articles provide for five (5) Directors. The names of the persons who were appointed to act as the first Directors were Herman R. Holsborg, Frederick I. Frischling, Ruth Meretz, Ruth Newman and Marci Adelman. Herman R. Holsborg assumed the office of President of said corporation and Frederick I. Frischling assumed the office [16] of Secretary and Treasurer of said corporation.

Said corporation was formed to take over the assets and the liabilities of Allied Wholesale & Distributing Co., a co-partnership composed of Frederick I. Frischling, Ruth Meretz, Ruth Baker, which co-partnership was formed in August of 1944. That thereafter, and on or about September 10, 1946, said corporation did, in fact, take over the assets and assume the liabilities of said co-partnership.

Pursuant to an agreement between the co-partners of said Allied Wholesale & Distributing Co. and Herman R. Holsborg, it was agreed that Herman R. Holsborg would invest in said corporation the sum of Twenty Five Thousand Dollars (\$25,000.00) and that twenty five per cent (25%) of the capital stock of said corporation should thereupon be issued to each of said four parties, subject to a permit so to do being first duly had and obtained from the Commissioner of Corporations, Department of Investment, Division of Corporations of the State of California. Pursuant to said agreement, said Herman R.

Holsborg did invest in said corporation the sum of Twenty Five Thousand Dollars (\$25,000.00) in cash, but no application for the issuance of the stock of said corporation was ever made to said Commissioner of Corporations, and none of the stock of the corporation was ever issued.

That the debtor corporation was engaged in the business of stock wholesale jobbing of general kitchen, housewares and electrical appliances, including radios and a few specialized hardware items.

The debtor's present situation has been brought about by a certain amount of friction, incompatibility and disharmony between Frederick I. Frischling, Ruth Meretz and Ruth Baker, on the one hand, and Herman R. Holsborg on the other, which has resulted in bringing the executive management of the business to a [17] stalemate and a standstill.

That heretofore a proposed Plan of Arrangement under Chapter XI of the Bankruptcy Act was proposed by the Debtor, but said plan was not acceptable to certain Creditors and it is believed and therefore alleged that the present plan will be acceptable to the Creditors of Debtor, as the Creditor's Committee elected by the Creditors have agreed thereto.

An arrangement under said Chapter XI of the Bankruptcy Act is necessary in order to pay to the Creditors of Debtor the greatest percentage of their claims that is possible under the circumstances and the present plan will accomplish this result.

II.

PROVISIONS MODIFYING OR ALTERING THE
RIGHTS OF UNSECURED CREDITORS

The unsecured debts of the Debtor are divided into the following classes:

A. All debts which have priority under Section 64a (1), (2), (4), (5) of the Acts of Congress Relating to Bankruptcy.

B. All debts incurred after the filing of the petition herein.

C. All proved and allowed claims for debts incurred prior to the filing of the petition herein, including a debt owed to Goldie M. Holsborg in the sum of Forty One Thousand Four Hundred Fifty One and 39/100ths Dollars (\$41,451.39).

All debts included in Class A shall be settled and satisfied by the payment to the holders thereof of one hundred per cent (100%) of their respective debts, to be paid in cash upon confirmation of the arrangement.

All debts included in Class B shall be settled and satisfied by the payment to the holders thereof of one hundred per cent (100%) of their respective debts, payable as the same shall become [18] due, except that the time of payment of all or any part of said debts may be extended by agreement with the creditor to whom such debts are due, and such extended debts shall, when due, have priority in payment over the other debts affected by this arrangement, save and except those included in Class A.

All debts included in Class C shall be settled and satisfied by payment to the holders thereof of forty per cent (40%) of their respective claims, provided however that

the debtor shall not in any event be required to pay to the creditors of Classes A, B and C including all costs and expenses of administration, a sum in excess of forty five per cent (45%) of the aggregate amount of all debts and proved and allowed claims of Classes A, B and C less the costs and expenses of administration; and in the event that forty five per cent (45%) of the aggregate of the debts and proved and allowed claims of Classes A, B and C less the costs and expenses of administration shall be insufficient to pay the debts included in Classes A and B including the costs and expenses of administration, plus forty per cent (40%) of the proved and allowed claims included in Class C, then the payments to the holders of the claims included in Class C shall be proportionately reduced by such excess over forty five per cent (45%) of the aggregate of the debts and proved and allowed claims included in Classes A, B and C excluding the costs and expenses of the administration. Said sum shall be paid in cash to the holders of the claims included in Class C within ten (10) days after the confirmation of this plan and the time for the filing of claims herein shall have expired.

III.

Upon confirmation of this arrangement, Herman R. Holsborg shall return unto the debtor estate the sum of approximately Thirteen Thousand Six Hundred and Ninety Dollars (\$13,690.00) in [19] cash heretofore removed by him from the assets of the debtor corporation. In the event that said Herman R. Holsborg shall fail or refuse so to return said sum unto the debtor, the debtor shall institute such proceedings and take such steps as it may deem necessary or advisable in order to cause the return of said sum to the debtor corporation.

All liens and/or attachments obtained or levied upon the assets of the debtor corporation within four (4) months immediately preceding the filing of the involuntary petition in bankruptcy herein, shall be released. In the event that any creditors having so obtained such a lien or levied such an attachment shall fail or refuse to voluntarily relinquish the same, the debtor and/or Receiver shall take such steps as necessary or advisable in order to obtain the release of such lien or attachment; providing, however, that the debtor shall not voluntarily permit any creditor to procure a preference over any other creditor save and except as in Article II hereof provided.

IV.

The debtor corporation shall pay all of the costs of administration herein, including the costs of Receivership, the fee of the Receiver, to be such sum as may be fixed by the Court. The debtor corporation shall pay a reasonable attorney's fee to the counsel for the petitioning creditors herein for his services in the preparing and filing of the involuntary petition in bankruptcy herein, the amount of said fee to be fixed by the above entitled court. The debtor corporation shall further pay a reasonable fee to the attorneys for the debtor for their services rendered herein, including by way of specification but not by way of limitation, representation of the debtor upon the involuntary proceeding herein, representation of the debtor upon objections to claims, and representation of the debtor in all matters con- [20] cerning plans of arrangement herein, which fee shall be in such sum as may be fixed by the above entitled court.

V.

Upon confirmation of this plan, the debtor shall be placed in possession of all its assets, and shall have all of the title, and exercise all of the rights and powers of a Trustee under the Bankruptcy Act, subject, however, at all times, to the control of the court and to such recommendations, restrictions, terms and conditions as the court may from time to time prescribe; and the debtor may thereupon reopen and recommence the operation of its business. The present Receiver in Bankruptcy of the debtor shall however continue in office until confirmation and performance of this plan of arrangement, for the purpose of instituting and/or prosecuting any and all proceedings necessary or advisable to cause the release or discharge of any of the liens, attachments and/or preferences described in Paragraph III hereof.

VI.

Upon confirmation and performance of this plan of arrangement, the Receiver shall be discharged, all of the remaining assets of every kind or description of the debtor shall be returned unto the debtor free and clear of all liens, encumbrances, claims and demands of every type and description, and your petitioner shall be discharged of all liability and/or claims affected by this plan.

VII.

Upon confirmation of this plan of arrangement by the court, the debtor agrees to execute any and all necessary documents or instruments, and take any and all corporate action required to consummate and effectuate the arrangement thus confirmed.

VIII.

The court shall retain jurisdiction until all of the provisions of this arrangement after its confirmation have been [21] performed.

COMMERCIAL WHOLESALERS, INC.

By Frederick I. Frischling

Secretary and Treasurer [22]

[Verified.]

[Endorsed]: Filed May 5, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Nov. 24, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

APPLICATION FOR CONFIRMATION OF FIRST
AMENDED PLAN OF ARRANGEMENT

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy:

Commercial Wholesalers, Inc., a California corporation, respectfully represents:

I.

The arrangement under Chapter XI of the Act of Congress relating to bankruptcy, proposed in the petition filed by it on the 5th day of May, 1947 has been duly accepted in accordance with the provisions of said chapter.

II.

The deposit required by the provisions of said chapter and by the said arrangement has been made.

III.

The provisions of Chapter XI of said Act have been complied with.

IV.

Said arrangement is for the best interests of the creditors. [24]

V.

Said arrangement is fair, equitable and feasible.

VI.

The debtor has not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to the discharge of a bankrupt.

VII.

The proposal of said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by said Act.

Wherefore the said Commercial Wholesalers, Inc., a California corporation, prays that said arrangement be confirmed by the Court.

COMMERCIAL WHOLESALERS, INC.

By Frederick L. Frischling

Secretary and Treasurer

[Verified.]

[Endorsed]: Filed May 21, 1947. Hubert F. Laughran, Referee.

[Endorsed]: Filed May 21, 1947. Edmund L. Smith, Clerk. [25]

[Title of District Court and Cause]

ORDER CONFIRMING ARRANGEMENT UNDER
CHAPTER XI

At Los Angeles, in said District, on the 5 day of
June, 1947.

I.

The application of Commercial Wholesalers, Inc., a corporation, for confirmation of its first amended plan of arrangement under Chapter XI of the Act of Congress relating to bankruptcy, proposed by said debtor in the petition filed by it on the 5th day of May, 1947, having been heard and duly considered; and due notice of said hearing having been given by mail to all persons entitled thereto; and no one having appeared in opposition to the confirmation of said arrangement; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said Chapter, and that the deposit required by the provisions of said Chapter and by said arrangement has been deposited with Paul W. Sampsell Receiver herein, as designated by the court, said Paul W. Sampsell having [26] been appointed by this court to receive and distribute the deposit; and

It further appearing and the court being satisfied that the provisions of said Chapter have been complied with; and that said arrangement is for the best interests of the creditors of said debtor; that said arrangement is fair and equitable, and feasible; that said debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal of said arrangement and its

acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by said Act; it is therefore

Ordered, that the said first amended plan of arrangement proposed by the debtor, be and the same is in all respects confirmed and approved, and title to all the debtor's property and assets wheresoever situate is hereby revested in the debtor, and it is further

Ordered, that within ten days from the date hereof the debtor may file any objections to the allowance of any claims heretofore or hereafter filed in this proceeding and not heretofore objected to, and shall bring on for hearing any such objections within fifteen days from and after the filing thereof, and shall serve a copy of such objections upon and give notice of such hearings to, the claimants by mail, not less than five days prior to the dates fixed for such hearings, and in the event of the failure of the debtor so to do, any objections to the allowances of the claims affected thereby shall be deemed waived; and it is further

Ordered, that when the amount and/or validity of the claims of creditors are adjudicated as hereinbefore provided, then in event that the amount of money deposited with said Receiver be less than forty-five per cent (45%) of the aggregate amount of all scheduled debts and proved and allowed claims of Classes "A", "B" and "C" (as defined in said first amended plan of arrangement) [27] less the costs and expenses of administration, the debtor shall deposit with said Receiver a sum equal to the difference between said amount on deposit and said forty-five per cent (45%); and if at said time said amount on deposit with said Receiver shall exceed said forty-five

per cent (45%) of said scheduled debts and proved and allowed claims, said Receiver shall pay to said debtor any such excess over said forty-five per cent (45%); and it is further

Ordered, that within ten days after the deposit in the hands of said Receiver may have been increased or decreased as in the preceding paragraph hereof prescribed, said Receiver shall distribute the deposit in his hands in the following manner, to wit:

1. The administration costs and expenses of these proceedings in the sums and to the persons as hereafter ordered by the undersigned Referee shall be paid in full.

2. The priority claimants whose debts are described in said plan of arrangement as Classes "A" and "B", whose claims have been proved and allowed, or whose debts are listed in the schedules of the debtor on file herein, shall be paid in full.

3. General unsecured creditors whose debts are described in said plan of arrangement as Class "C", whose claims have been proved and allowed or whose debts are listed in the schedules of the debtor on file herein, shall be paid forty per cent (40%) of their respective claims or debts; provided that if after making the payments as provided in paragraphs 1 and 2 above, the balance of said deposit remaining in the hands of said Receiver shall be insufficient to pay forty per cent (40%) of the said debts and said claims included in said Class "C", then said Receiver shall distribute said balance of said deposit to said general unsecured creditors whose debts are designated as Class "C" in said plan of arrangement, pro rata in the proportion that their respective debts or claims bear to said balance.

It Is Further Ordered, that the distribution of the money deposited with said Receiver for the purpose of consummating said [28] arrangement shall be made by check to be drawn and signed by said Receiver and countersigned by the undersigned Referee in Bankruptcy; and it is further

Ordered, that these proceedings shall be kept open for the purpose of hearing and determining such objections as may be filed to the claims of creditors herein; and it is further

Ordered, that the debtor be and it is hereby discharged from all of its debts, claims and liabilities except such debts as are by law excepted from discharge; and it is further

Ordered, that all creditors of, and all claimants against the debtor are hereby restrained and enjoined from pursuing or attempting to pursue and from commencing any suits or proceedings at law or in equity against the debtor directly or indirectly upon any right, claim or interest which any such creditor or claimant may have had against the debtor at the time of the commencement of this proceeding excepting only such debts, liabilities and claims as are expressly excepted by law from discharge; and it is further

Ordered, that the balance of the moneys deposited, in excess of the amount required for the foregoing disbursements, be paid to said debtor by check drawn, signed, and countersigned as aforesaid; and it is further

Ordered, upon the making of the payment directed by this order and the disposition of the exceptions to claims herein, this proceeding for an arrangement under Chapter XI of the Bankruptcy Act be, and the same is hereby terminated and closed.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Jun. 5, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Sep. 9, 1947. Edmund L. Smith, Clerk. [29]

[Title of District Court and Cause]

PETITION FOR FINAL DECREE

To the Honorable Hubert F. Laugharn, Referee Presiding in the Above Entitled Matter:

The verified Petition of Commercial Wholesalers, Inc., a California corporation, the above named debtor, respectfully represents:

I.

That said debtor's First Amended Plan of Arrangement, on file herein, has heretofore been confirmed by Order of the above entitled Court, duly and regularly made and entered in the above matter.

II.

That all of the money and consideration required to be deposited and distributed under said Plan of Arrangement and Order confirming same, has heretofore been deposited with Paul W. Sampsell, Receiver of the estate of said debtor, and by said Receiver distributed to the creditors of said debtor in accordance with said First

Amended Plan of Arrangement and the [30] Order confirming same.

III.

That said Paul W. Sampsell, Receiver, has filed herein his Final Report and Account, setting forth in detail his receipts and disbursements of said money, and said Report and Account has been duly and regularly settled, allowed and approved by Order of the above entitled Court duly and regularly entered herein.

IV.

That all objections to the claims of creditors that the debtor intends to or may file pursuant to said First Amended Plan of Arrangement and the Order confirming same, or otherwise, have been filed, heard and determined, and the Orders thereon duly and regularly made by the above entitled Court have become final.

V.

That all of the matters and things required to be done under Section 367, subdivision (2), and subdivision (3), Section 369 and Section 370 of the Bankruptcy Act have been done and completed.

VI.

That by virtue of the distribution of said moneys to the creditors of said debtor in accordance with said First Amended Plan of Arrangement and the Order confirming same, the debts of said creditors have been fully settled, satisfied, paid and discharged. Therefore, said creditors, their heirs, executors, administrators, successors and assigns should be forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity, against the debtor, its successors, predecessors or assigns, based upon any debt or claim

scheduled or filed herein, excepting only debts excepted by law from discharge. [31]

VII.

That said Paul W. Sampsell, Receiver of the estate of said debtor, should be discharged, and the estate of said debtor, Commercial Wholesalers, Inc., a California corporation, should be closed.

Wherefore petitioner prays for a Final Decree of this Court:

(1) That all creditors of Commercial Wholesalers, Inc., a California corporation, whose debts or claims have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns, be forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity, against the debtor, its successors, predecessors or assigns, based upon any such debt or claim scheduled or filed herein, excepting only debts excepted by law from discharge.

(2) That Paul W. Sampsell, Receiver of the estate of said debtor, be discharged.

(3) That the estate of Commercial Wholesalers, Inc., a California corporation, debtor, be closed.

(4) For such other and further relief as is just.

COMMERCIAL WHOLESALERS, INC.

By Frederick L. Frischling

Secretary and Treasurer

Petitioner

ALFRED GITELSON

By Robert R. Ashton, of Counsel

Attorney for Petitioner [32]

Paul W. Sampsell, Receiver herein, by and through his attorneys of record does hereby waive notice of hearing of the within Petition.

CRAIG & WELLER

By Frank C. Weller

Attorneys for Receiver

[Verified.]

[Endorsed]: Filed Nov. 12, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Nov. 24, 1947. Edmund L. Smith, Clerk. [33]

[Title of District Court and Cause]

FINAL DECREE

Upon reading and filing the verified Petition of Commercial Wholesalers, Inc., a California corporation, the above named debtor, praying for a Final Decree herein, and good cause appearing therefor, and the Court being fully advised in the premises, now, therefore, it is

Ordered, Adjudged and Decreed:

That all of the debts of said Commercial Wholesalers, Inc. which have been scheduled herein or upon which claims have been filed herein, have been fully settled, satisfied, paid and discharged.

That all creditors of said Commercial Wholesalers, Inc., a California corporation, debtor in the above entitled mat-

ter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns, be and each of them are hereby forever enjoined and debarred from pursuing or attempting to pursue, commencing, [34] prosecuting or maintaining any actions, suits or proceedings at law or in equity, against the debtor, its successors, predecessors or assigns, based upon any such debt or claim, scheduled or filed herein, excepting only debts excepted by law from discharge.

That Paul W. Sampsell, Receiver of the estate of said debtor, be and he is hereby discharged.

That the estate of Commercial Wholesalers, Inc., a California corporation, debtor, be and the same is hereby closed.

Dated at Los Angeles, California, this 12 day of November, 1947.

HUBERT F. LAUGHARN

Referee

[Endorsed]: Filed Nov. 12, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Nov. 18, 1947. Edmund L. Smith, Clerk. [35]

[Title of District Court and Cause]

PETITION FOR RECONSIDERING AND RE-
FORMING FINAL DECREE MADE ON NO-
VEMBER 12, 1947

To Hubert F. Laugharn, Referee:

Comes now the Investors Commercial Corporation, a corporation, and shows to this court that the Kisco Products, Inc., a corporation, a creditor of Commercial Wholesalers, Inc., filed its claim in the above entitled matter for the sum of \$5732.80, which claim was duly approved and a dividend of \$2225.28 payable to creditor was paid thereon, leaving a balance due of \$3507.52;

That said account has been duly assigned and transferred to your petitioner herein, who is the present owner and holder thereof and is interested in the collection of the balance due on said claim; that said claim was represented by merchandise originally sold and delivered by said Kisco Products, Inc., to the Allied Wholesale & Distributing Company, a copartnership, which indebtedness was thereafter assumed by said Commercial Wholesalers, Inc.;

That on June 5, 1947 an order was made herein confirming the arrangements submitted by said Commercial Wholesalers, Inc. under Chapter XI of the Bankruptcy Act of the United States, which order, among other things, provided: [36]

“That all creditors of and all claimants against the debtor are hereby restrained and enjoined from pursuing or attempting to pursue, or from commencing

ing any suits or proceedings at law or in equity against the debtor, directly or indirectly, upon any right, claim or interest which any such creditor or claimant may have had against the debtor at the time of the commencement of this proceeding, excepting only such debts, liabilities and claims as are expressly excepted by law from discharge;

“That the debtor be and it is hereby discharged from all of its debts, claims and liabilities, except such debts as are by law excepted from discharge.”

That thereafter a final decree was made herein dated November 12, 1947 wherein, among other things, it was ordered:

“That all creditors of said Commercial Wholesalers, Inc., a corporation, debtor in the above entitled matter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns be, and each of them, are hereby forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity against the debtor, its successors, predecessors, or assigns, based upon any such debt or claim scheduled or filed herein, excepting only such debts, excepted by law from discharge.”

That the above order made on June 5th, 1947 confirming arrangements for settlement and discharge of claims under Chapter XI in which all creditors had notice before the acceptance of [37] dividends merely provides that such creditors were restrained and enjoined from pur-

suing, or attempting to pursue, or from commencing any suits or proceedings at law or in equity against the debtor, directly or indirectly, upon any right, claim or interest and did not provide for such injunction or debarring of creditors from bringing or maintaining suits and proceedings against predecessors of said alleged bankrupt and debtor, and said creditors were not aware of the fact that by accepting dividends in said proceedings that they were going to be debarred and enjoined from pursuing any rights they had, or may have had, against predecessors of said alleged bankrupt and debtor, and that your petitioner believes that said final decree of November 12, 1947, wherein it attempted to provide for injunction against creditors from maintaining or pursuing any actions they had, or might have had, against the predecessors of the alleged bankrupt and debtor, was made by inadvertence, and it was not the intention of this court that creditors should be so enjoined and debarred.

Wherefore your petitioner prays that an order may be had herein for reconsidering and reforming said final decree of November 12, 1947, by eliminating and deleting the word "predecessors" therefrom.

CATLIN & CATLIN

By Frank D. Catlin

Attorneys for Investors Commercial Corporation,
a Corp.

[Endorsed]: Filed Nov. 25, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

Upon reading and filing of a petition of Investors Commercial Corporation, a corporation, upon the application of Catlin & Catlin, its attorneys, and good cause being shown therefor, It Is Ordered that the above estate is reopened and the file returned from the clerk,

It Is Hereby Ordered that Commercial Wholesalers, Inc., a corporation, the alleged bankrupt and debtor, appear before this court in the court room of Hon. Hubert F. Laugharn, Referee in Bankruptcy, 340 Federal Building, Los Angeles, California, on the 4 day of December, 1947 at the hour of 10 o'clock A. M. and to then and there show cause, if any it has, why said final decree made herein on November 12th, 1947, should not be reconsidered and reformed as per the prayer of the petition of Investors Commercial Corporation, a corporation, and

It Is Further Ordered that a copy of said petition and a copy of this order be served upon the Commercial Wholesalers [39] Inc., a corporation, the Alleged Bankrupt and debtor, by serving its attorney, Alfred Gitelson.

Dated: November 25, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Nov. 25, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

MODIFICATION OF FINAL DECREE

This matter coming up for hearing on the 4th day of December, 1947, before the Honorable Hubert Laugharn, Referee, upon his order to show cause why the final decree made herein on November 12, 1947, should not be reconsidered and reformed, and it appearing that due notice was given in accordance with said Order to Show Cause, and Catlin & Catlin, by Frank D. Catlin, Esq., appearing as attorney for Investors Commercial Corporation, and Alfred Gitelson, by Robert Ashton, Esq., appearing as attorney for the Commercial Wholesalers, Inc., Alleged Bankrupt and Debtor, and after hearing arguments of counsel and being fully advised in the premises, and having taken the matter under consideration the Court finds that proceedings under Chapter XI of the Bankruptcy Act of the United States does not discharge guarantors, sureties or predecessors of said alleged Bankrupt or Debtor, and the word "predecessors" appearing on lines 2 and 3 on page 2 of said final order dated November 12, 1947, was inserted by error and inadvertence, and [41]

It Is Therefore Ordered, Adjudged and Decreed that the final decree heretofore made and filed on November 12th, 1947, be and the same is hereby modified and reformed in the following particulars:

That the word "predecessors" contained at the end of line 2 and the beginning of line 3 on page 2 of said de-

cree be stricken and deleted and eliminated therefrom and said paragraph in which said word "predecessors" was contained, read as follows:

"That all creditors of said Commercial Wholesalers, Inc., a California corporation, debtor in the above entitled matter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns be, and each of them are hereby forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity against the debtor, its successors or assigns, based upon any such debt or claim scheduled or filed herein, excepting only debts excepted by law from discharge."

Dated December 24, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 24, 1947. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

PETITION FOR ORDER EXTENDING TIME
WITHIN WHICH TO PETITION FOR RE-
VIEW

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy, Presiding in the Above Entitled Cause:

Your petitioner, Commercial Wholesalers, Inc., a corporation, the above named debtor, hereby petitions for an Order extending time within which it may petition for review, and alleges as follows:

I.

That on December 24, 1947, there was made and entered in the above entitled cause an order entitled "Modification of Final Decree". That your petitioner desires to take a review of said Order, but has been unable to file said petition for review within the ten day period prescribed by the Bankruptcy Act, by reason of the facts hereinafter set forth.

II.

Your petitioner's counsel, Alfred Gitelson, did not receive any notice of the entry of said Order until December 29, 1947, when he received a copy thereof in the mail; at which time five of the ten days permitted by law had already expired.

III.

That after receiving said notice, said Alfred Gitelson was unable to convey the information to your petitioner by reason of the fact that Frederick I. Frischling, the

Secretary-Treasurer of the debtor corporation, and the only officer of said corporation available in the City of Los Angeles was ill, at home in bed. Your petitioner did not, by reason of said facts, receive notice of the entry of said order until December 31, 1947.

IV.

That the office of your petitioner's counsel, to wit, Mr. Alfred Gitelson, was closed from the afternoon of December 31, 1947 until the morning of January 5, 1948, by reason of the New Year's holidays.

V.

That your petitioner has now caused to be prepared a petition for review of said order, but has not had sufficient time to file the same within the ten day period prescribed by the Bankruptcy Act.

Wherefore, your petitioner prays for an order extending the time within which your petitioner may file a petition for review of said order entitled "Modification of Final Decree", entered herein on December 24, 1947, to and including January 6, 1948.

COMMERCIAL WHOLESALERS, INC.,
a corporation

By Frederick I. Frischling

Debtor

ALFRED GITELSON

By Robert R. Ashton, of Counsel

Counsel for Petitioner [45]

ORDER

Good Cause Appearing Therefor, it is hereby ordered that the time within which Commercial Wholesalers, Inc., a corporation, the above named debtor, may file herein a petition for a review of that certain order entered herein on December 24, 1947, entitled "Modification of Final Decree" to be and the same is hereby extended to January 6, 1948.

Dated: January 5, 1948.

HUBERT F. LAUGHARN

Referee [46]

[Verified.]

[Endorsed]: Filed Jan. 5, 1948. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S ORDER
BY JUDGE

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy, Presiding in the Above Entitled Cause:

Your petitioner, Commercial Wholesalers, Inc., a corporation, the above named debtor, hereby petitions for review by the Judge of your Order made and entered on the 24th day of December, 1947, and that the same be vacated and set aside, and alleges as follows:

I.

That your petitioner is the debtor in the above entitled matter.

II.

That on November 12, 1947, the Honorable Hubert F. Laugharn, Referee presiding in the above entitled matter, made and entered herein a final decree. No review of said final decree was taken, and the same became final ten days after the entry thereof, to wit, on November 22, 1947. [48]

III.

That thereafter, and on November 25, 1947, Investors Commercial Corporation, a corporation, one of the debtor's creditors, filed a petition herein entitled "Petition for Reconsidering and Reforming Final Decree Made on November 12, 1947", upon which Petition an Order, dated November 25, 1947, was made herein by said Referee Hubert F. Laugharn, whereby it was ordered that this estate was reopened, and that the above named debtor appear before said Referee on December 4, 1947 and show cause why said final decree should not be reconsidered and reformed by eliminating and deleting therefrom the word "predecessors".

IV.

Said Order to Show Cause came on regularly to be heard and was heard by said Referee on December 4, 1947, and thereafter and on the 24th day of December, 1947, said Referee made and entered an order herein entitled "Modification of Final Decree", a true and correct copy of which is hereto attached, marked Exhibit "A", and made a part hereof by reference.

V.

That the above entitled matter was closed on the 12th day of November, 1947.

VI.

That said Order is erroneous for the following reasons, to wit:

1. That said final decree was made and entered herein on November 12, 1947, and no review was taken thereof so that said order became final on November 22, 1947. Therefore, said Referee had no jurisdiction, power or authority thereafter to reconsider, reform, modify and/or amend said final decree.

2. Said final decree was correct as originally made and [49] entered herein on November 12, 1947, for the reason that the debtor's First Amended Plan of Arrangement, which was confirmed herein, provided that the unsecured debts of the debtor should be settled and satisfied by payment of the amounts set forth in said plan. Therefore said plan, having been fully carried out by the debtor, it constituted an accord and satisfaction of said debts between the debtor and its creditors, which acted to discharge the debtor's predecessors or joint debtors from payment of said debts.

3. That the said Referee had no jurisdiction, power or authority to reopen this estate on November 25, 1947, or at any other time for the reason that said estate had, prior to said time, been closed.

Wherefore, your petitioner prays for a review of said Order by the Judge, and that the said Order be vacated and set aside.

Dated: January 5, 1948.

COMMERCIAL WHOLESALERS, INC.,
a California corporation,

By Frederick I. Frischling

Petitioner

ALFRED GITELSON

By Robert R. Ashton, of Counsel
Counsel for Petitioner

EXHIBIT A

In the District Court of the United States
Southern District of California, Central Division

In the Matter of Commercial Wholesalers, Inc., a corporation, Alleged Bankrupt. No. 44685 O'C.

MODIFICATION OF FINAL DECREE

This matter coming up for hearing on the 4th day of December, 1947, before the Honorable Hubert Laugharn, Referee, upon his order to show cause why the final decree made herein on November 12, 1947, should not be reconsidered and reformed, and it appearing that due notice was given in accordance with said Order to Show Cause, and Catlin & Catlin, by Frank D. Catlin, Esq., appearing as attorney for Investors Commercial Corporation, and Alfred Gitelson, by Robert Ashton, Esq., appearing as attorney for the Commercial Wholesalers, Inc., Alleged Bankrupt and Debtor, and after hearing arguments of counsel and being fully advised in the premises, and having taken the matter under consideration the Court finds that proceedings under Chapter XI of the Bankruptcy Act of the United States does not discharge guarantors, sureties or predecessors of said alleged Bankrupt or Debtor, and the word "predecessors" appearing on lines 2 and 3 on page 2 of said final order dated November 12, 1947, was inserted by error and inadvertence, and [50]

It Is Therefore Ordered, Adjudged and Decreed that the final decree heretofore made and filed on November 12th, 1947, be and the same is hereby modified and reformed in the following particulars:

That the word "predecessors" contained at the end of line 2 and the beginning of line 3 on page 2 of said decree be stricken and deleted and eliminated therefrom and said paragraph in which said word "predecessors" was contained, read as follows:

"That all creditors of said Commercial Wholesalers, Inc., a California corporation, debtor in the above entitled matter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns, be, and each of them are hereby forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity against the debtor, its successors or assigns, based upon any such debt or claim scheduled or filed herein, excepting only debts excepted by law from discharge."

Dated December 24, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy [51]

[Verified.]

[Endorsed]: Filed Jan. 5, 1948. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [52]

[Title of District Court and Cause]

CERTIFICATE ON REVIEW

To the Honorable J. F. T. O'Connor, Judge of the United States District Court for the Southern District of California, Central Division:

I, Hubert F. Laugharn, Referee in Bankruptcy to whom the above entitled matter has been referred, do hereby certify as follows:

An order was made herein on June 5, 1947 confirming the Plan of Arrangement of the debtor. Thereafter a creditor, Investors Commercial Corporation, assignee of Kisco Products Inc., contended that it could proceed against others who it contended were liable on the same obligation which was dealt with under the Plan of Arrangement which provided for payment of 45% on its general claims. This creditor assignor received the said agreed percentage in the arrangement proceedings.

Upon the conclusion of the debtor proceedings, the debtor thereupon presented a Final Decree which was signed on November 12, 1947. The same was presented ex parte and without notice to this or any other creditors. This Final Decree restrained and enjoined [53] creditors from prosecuting or maintaining any action against the debtor, its successors, predecessors or assigns, based upon any such debts scheduled or filed herein.

Thereupon the creditor filed before the Referee a Petition for Reconsidering and Reforming Final Decree Made on November 12, 1947, and the Referee made an order reopening the proceeding and an order to show cause was issued requiring the debtor to show cause why the said

Final Decree should not be reconsidered, and, in effect, that portion thereof above underscored be deleted.

The Order to Show Cause came on for hearing and the Debtor and the creditor and their respective attorneys appeared, and thereafter a Modification of Final Decree was made on December 24, 1947, which in effect deleted the said underscored portion of the original Final Decree above referred to.

Thereafter there was duly filed by the Debtor the Petition for the Review thereof.

My reasons for making the order were as follows: An inspection of the Plan of Arrangement revealed no express provision releasing the liability of others than the debtor. The so-called Final Decree of November 12, 1947 could add nothing to the Plan of Arrangement, i. e., the contract between the debtor and its creditors. Its presentation with the questioned inclusion was no doubt prompted by the threatened action of the creditor against others than the debtor. It was ex parte and without notice to the creditors and served no other useful or statutory purpose other than to discharge the Receiver. And the inclusion of restraining action by the creditors against persons other than the debtor was an attempted determination of the legal right of creditors to proceed against others than the debtor.

As to the legal rights of the debtor in the premises, I determined that the Plan of Arrangement neither by express terms [54] nor legal intendment released or discharged the liability against third persons.

American Improvement Co. v. Lilienthal, 43 Cal. App. 80.

8 C. J. S., 1497-1546-1559.

Collier on Bankruptcy, 14th Ed., Vol. 1, pages 1522-30.

Collier on Bankruptcy, 14th Ed., Vol. 8, page 1273 and Supplement.

Klipstein & Company v. Lipschitz, 10 A. B. R. (N. S.) 600.

Matter of American Paper Co., 42 A. B. R. 716, 719.

Matter of Kornbluth, 23 A. B. R. (N. S.) 347.

Schram v. Perkins, 38 Fed. Supp. 404.

The order being ex parte, the proper practice for the objecting creditor was to move to set the same aside and not review thereof. Doyle v. Ponsford, 53 A. B. R. (N. S.) 319 Fed. 2d

Although the time for filing a Petition for Review to the said Final Decree had expired under Section 39c of the Bankruptcy Act, under the authority of Pfister v. Northern Illinois Finance Corp., 63 S. Ct. 133, 51 A. B. R. (N. S.) 99, 1942, and In the Matter of Thomas Nugent Crofton, Bankrupt, #1427, D. C., So. District of California, Southern Division (Opinion by Judge Paul J. McCormick), and in this particular case, since the rights of the parties had not changed, I would have granted the Review beyond the time. Furthermore since the objectional portion of the Final Decree was included in my order through inadvertence and without notice to the creditors, I took the view that I should (upon hear-

ing and notice to the debtor), delete it and leave the parties to their legal rights in the state courts.

The inclusion of the restraint against others than the Debtor in the Final Decree of November 12, 1947 was ex parte and without consideration of the vested and contractual rights of [55] creditors and when its effect was called to my attention as being a determination thereof and further that my order would be set up before other courts as a determination of the right, or rather a bar thereto, I determined to set the same aside and hear the parties on their respective rights in the premises.

There is included and forwarded herewith the following:

- (1) Petition for Reconsidering and Reforming Final Decree Made on November 12, 1947.
 - (2) Order to Show Cause.
 - (3) Modification of Final Decree.
 - (4) Petition for Review of Referee's Order by Judge.
- Dated: January 14, 1948.

Respectfully submitted,

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 14, 1948. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

STATEMENT OF FACTS AND POINTS AND AUTHORITIES OF COMMERCIAL WHOLESALEERS, INC., A CORPORATION, DEBTOR, RE PETITION FOR REVIEW OF REFEREE'S ORDER BY JUDGE

To the Honorable J. F. T. O'Connor, Judge of the United States District Court, Southern District of California, Central Division:

Comes now Commercial Wholesalers, Inc., a corporation, Debtor in the above entitled matter, and for a Statement of Facts and Points and Authorities in support of its Petition for Review of Referee's Order made and entered on the 24th day of December, 1947, modifying the Final Decree herein, respectfully submits as follows:

STATEMENT OF FACTS

On November 12, 1947, the Referee herein made and entered herein the Final Decree. No review of said Final Decree was ever taken. [57]

That thereafter, and on said 12th day of November, 1947, the Referee herein closed this entire matter.

That thereafter, and on November 25, 1947, Investor's Commercial Corporation, a corporation, one of the debtor's creditors, filed a petition herein entitled "Petition for Reconsidering and Reforming Final Decree Made on November 12, 1947", upon which petition the Referee herein made an order dated November 25, 1947, whereby said Referee ordered that this estate was reopened, and that the above named debtor appear before

said Referee on December 4, 1947, and show cause why said final decree should not be reconsidered and reformed by eliminating and deleting therefrom the words "predecessors".

Said Order to Show Cause came on regularly to be heard and was heard by said Referee on December 4, 1947, and thereafter, and on the 24th day of December, 1947, said Referee made and entered an order herein entitled "Modification of Final Decree", whereby and under the terms of which order said Referee modified and reformed said Final Decree by deleting therefrom the word "predecessors" contained at the end of line 2 and the beginning of line 3 on page 2 of said Final Decree.

The First Amended Plan of Arrangement filed herein May 5, 1947, which was thereafter confirmed by order of the Referee prior to the making and entering of said Final Decree, provided in effect that all of the debts of the debtor that were unsecured shall be settled and satisfied by payment to the holders thereof of forty per cent of their respective claims.

I.

THE REFEREE HAD NO JURISDICTION TO ORDER THAT THIS ESTATE WAS REOPENED ON NOVEMBER 25, 1947.

The Referee had no authority, power or jurisdiction to order that this estate was reopened on November 25, 1947, since he had previously closed the case on November 12, 1947. The Referee's [58] authority to act as a Court of Bankruptcy under an order of general reference

in a particular case ceases after he has made his report and the case is closed.

Volume 2, Collier on Bankruptcy (14th Ed.), page 1415.

Heywood-Wakefield Co. v. Small (C. C. A., 1st Cir.), 36 Am. B. R. (N. S.) 965, 96 Fed. (2d) 496.

Therefore, any petition to reopen the estate should have been directed to the District Judge, who might grant the petition or not, as he saw fit, and if he granted it, thereafter re-refer the case to a Referee.

Heywood-Wakefield Co. v. Small (C. C. A., 1st Cir.), 36 Am. B. R. (N. S.) 965, 96 Fed. (2d) 496.

Pollack v. Meyer Bros. Drug Co. (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

Since the Referee had no jurisdiction to reopen the case, his order so purporting to reopen the case was void and of no force or effect. Since he had no such jurisdiction, and since his purported order was void and a nullity, his subsequent order herein made pursuant to said order purporting to reopen the case, which was made on December 24, 1947, purporting to modify said Final Decree, and which is the subject of this petition for review, was wholly void for lack of jurisdiction of the Referee to make or enter such an order.

II.

THE REFEREE HAD NO JURISDICTION, POWER OR AUTHORITY TO RECONSIDER, REFORM, MODIFY OR AMEND SAID FINAL DECREE

The rule in the Circuit Court of Appeals, Ninth Circuit, is well settled that once a Referee has entered an order, the Referee's power over the order is ended. The remedy of review [59] is exclusive, and the Referee may not review or change the order.

In re Faerstein, 58 Fed. (2d) 942.

In the Faerstein case cited above, the Referee made and entered a "Turnover Order" and no review thereof was sought. Nine days thereafter the Referee made an order that the Turnover Order be set aside and annulled. On review, the order setting aside and annulling the Turnover Order was reversed. On appeal to the Circuit Court, wherein the District Court was affirmed, the Court propounded this question:

"The issue concisely is, Did the Referee have the power, after having made and entered final findings and conclusions, and after the 'Turnover Order' was issued, to set the same aside, or was the exclusive power vested by law and rule in the United States District Judge to review such order?"

In holding that a Referee had no power to amend his order once it was entered, the Circuit Court said in part:

"Referees are invested with certain powers, 'subject always to a review by the judge.' Section 66, title 11, USCA. The referee has no independent judicial authority. He is not a distinct court, and has no power not conferred by order of reference,

by law or general orders. 'The districts courts of the United States in the several States * * * are made courts of bankruptcy.' 11 USCA, Section 11. A court is said by Blackstone to be a vested judicial power to adjudicate issues between contending factors, and is composed of the actor, or plaintiff; the reus, or defendant; and the judex, the judicial power which examines the truth of the contending parties and applies the remedy. A [60] referee is an instrumentality of the Court, with limited powers. His jurisdiction is defined by section 66, title 11, U.S.C. A., *supra*, and his duties are given in section 67. Neither of these sections gives him the power to review and set aside the order made, and in issue on this appeal.

"General Order No. 27 of the Supreme Court (11 USCA, Section 53) provides that, when a review is sought of any order of the referee, a petition shall be filed with the referee setting forth the error complained of and the referee shall certify to the United States District Judge the question presented, a summary of the evidence, and finding and the order of the referee thereon. The procedure is specific and clearly stated. Rule 84 of the trial court requires that a petition for review, as provided in General Order 27, *supra*, must be filed with the referee within ten days from the date of notice of such order.

"When an order is entered, the referee's power over the order is ended. The remedy is exclusive and he may not review or change the order. In *re Russell* (D. C.), 105 F. 501; In *re Wister & Co.* (D. C.), 232 F. 898; also, In *re Greek Mfg. Co.*

(D. C.), 164 Fed. 211; In re Marks (D. C.), 171 F. 281; In re Avoca Silk Co. (D. C.), 241 F. 607; Matter of J. W. Renshaw's Sons, Bankrupt (D. C.), 3 F. (2d) 75; Matter of Wm. L. David (C. C. A.), 33 F. (2d) 748; David vs. Hubbard, 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585.

"That the procedure of review is plainly defined and power limited in the interest of regu- [61] larity and for the common good is clearly stated by Judge Sawtelle of this court, sitting as District Judge, in Re Octave Mining Co. (D. C.), 212 Fed. 457, 458, as follows: 'It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed. * * *'"

That the foregoing case is still the law in this District is not open to dispute, in view of the fact that it was cited with approval in the recent case of

Grandee v. Arizona Wax Paper Co. (C. C. A., 9th Cir.), 90 Fed. (2d) 801.

III.

THE ORDER OF DECEMBER 24, 1947, AMENDING THE FINAL DECREE WAS ERRONEOUS BECAUSE THE FIRST AMENDED PLAN OF ARRANGEMENT CONSTITUTED AN ACCORD AND SATISFACTION, EXTINGUISHING THE OBLIGATIONS OF THE CREDITORS

The First Amended Plan of Arrangement herein provided that the unsecured debts of the debtor should be settled and satisfied by payment to the holders thereof of forty per cent of their respective claims. Since a

Final Decree was admittedly entered herein, it cannot be denied but that the Plan of Arrangement was consummated and the creditors paid their forty per cent of their claims as provided in the Plan. That being true, the original obligations became extinguished by reason of the accord and satisfaction.

An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

California Civil Code, Section 1521. [62]

Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

California Civil Code, Section 1522.

Acceptance by the creditors of the consideration of the accord extinguishes the obligation, and is called satisfaction.

California Civil Code, Section 1523.

In the case of *Russell v. Riley, etc.*, 82 Cal. App. 728, at 737, the Court said:

“If the consideration be considered as one of accord and satisfaction, then the rule is well settled that where an agreement to accept in full payment a sum less than the amount in dispute is shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished.”

In the *Estate of Connell*, 121 Cal. App. 703, Mrs. Connell and her deceased husband were jointly liable on an obligation to the plaintiff. Plaintiff filed suit against Mrs.

Connell individually (she being administratrix of her deceased husband's estate) and also filed a claim in the estate for the same obligation. The plaintiff recovered judgment against Mrs. Connell individually, and subsequently accepted from her one-half of the judgment, plus her agreement not to appeal from the judgment, in payment and satisfaction of the judgment. Later, plaintiff filed this action against the estate for the balance of the claim. In holding that the accord with Mrs. Connell extinguished the debt and released the estate of Mr. Connell from further payment to [63] the plaintiff, the Court said in part:

“Had the judgment in the civil action been paid in full, appellant could not have recovered anything under the claim filed in the estate. Here we have a situation in which, by accord and satisfaction, the consideration being the payment of one-half of the amount of the judgment on or before the date specified, and the further consideration that the judgment debtor would not prosecute an appeal, the judgment was satisfied, and, by the agreement, the transaction included a settlement not only of the judgment, but of the note and claim in the estate. We hold that, under these conditions, appellant ceased to have any further rights to the recovery of money by reason of the note, and that the settlement extinguished the claims in the estate as fully as though judgment had been paid in full.”

In the case of *B & W Engineering Co. vs. Bean*, 23 Cal. App. 164, at 170, the Court said in part:

“The phrase ‘accord and satisfaction’ as it is known and applied in the law means the substitution

of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of the parties having a right of action against the other, upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of said right of action different from and usually less than that which might be [64] recovered upon the original obligation (Civil Code, Section 1521). The effect of such agreement when executed is to extinguish the antecedent liability (Civil Code, Section 1523)."

In the case of Keeling Corp., Ltd. vs. Pacific Products, Inc., 138 Cal. App. 180, the District Court of Appeal held as follows:

"There is a distinction between a discharge in bankruptcy and a composition settlement and the consequences which flow therefrom. A composition with creditors partakes of the nature of a contract, in a measure superseding and outside of the bankruptcy proceedings. It is an offer and acceptance, and the respective rights of the bankrupt and the creditors are fixed by the terms of the offer upon its confirmation. Whether, therefore, a discharge in bankruptcy merely bars the remedy or completely extinguishes the legal obligation is a matter of academic interest, as the composition agreement by its express terms provided the sum paid was 'in full of such creditors claims' against the corporation. The stockholders were released therefor not by a discharge in bankruptcy but under an express contract. This

agreement completely extinguished and wiped out the entire legal obligation of the company. It has been universally held that the constitutional liability of stockholders of a corporation for its debts is released by the full performance of a volun- [65] tary composition agreement between the corporation and its creditors (citing *San Jose Savings Bank v. Pharis*, 58 Cal. 380).

“Whatever satisfies or extinguishes the debt as to the corporation, extinguishes also the liability of the stockholders, for the reason that there can be only one satisfaction of the debt (*Young v. Rosenbaum*, 39 Cal. 646, 654; 6a Cal. Jur. 1018; *O’Connell Shoe Co. v. Benson Cooperative Mechanical Co.*, 175 Minnesota, 382). The statutory liability of a stockholder is dependent upon the actual existence of an indebtedness (*Ellsworth v. Bradford*, 186 Cal. 316). Here, as above indicated, the entire indebtedness has been discharged, satisfied and wiped out. There was, therefore, no debt upon which the alleged statutory liability could be based.”

See also to the same effect:

San Jose Savings Bank v. Pharis, 58 Cal. 380; and
Young v. Rosenbaum, 39 Cal. 646.

In summary, the Debtor contends:

(1) The Referee had no jurisdiction, power or authority to reopen this case after it had been closed, and his subsequent order of December 24, 1947 based upon

the reopening of the case was void for lack of jurisdiction.

(2) Having once entered his Final Decree herein, the Referee had no jurisdiction, power or authority thereafter to reconsider, reform, modify or amend said Final Decree, and his [66] order of December 24, 1947 purporting so to do should be vacated, and set aside.

(3) The order of December 24, 1947, deleting the word "predecessors" from the Final Decree was erroneous because the First Amended Plan of Arrangement providing for the settlement and satisfaction of the debtor's obligations by payment of a percentage thereof to its creditors constituted an accord and satisfaction between the debtor and its creditors; and the provision in the Final Decree prohibiting the creditors from prosecuting actions upon extinguished liabilities was lawful and proper.

Respectfully submitted,

ALFRED GITELSON

By Robert R. Ashton, of Counsel
Counsel for Debtor [67]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 19, 1948. Edmund L. Smith,
Clerk. [68]

[Title of District Court and Cause]

[OPINION]

Alfred Gitelson, Esquire, representing the Debtor
Los Angeles, Calif.

Francis F. Quittner, Esquire, and Robert E. Ross-
kopf, Esquire, representing the Petitioning Creditors,
Los Angeles, Calif.

Catlin & Catlin, attorneys for the Respondent, In-
vestors Commercial Corporation, a corporation, Los
Angeles, Calif.

O'Connor, J. F. T. Judge.

Quaere: Where a Referee Has Made an Order or De-
cree Closing a Case, Is a Petition to Reopen the Case
Properly Presentable to Him for Determination or
Should It Be Presented to the District Judge?

After the Referee had closed this case by a Final De-
cree on November 12, 1947, the Investor's Commercial
Corporation, a corporation, one of the debtor's creditors,
on November 25th, 1947, filed its Petition for Recon-
sidering and Reforming the Final Decree made on No-
vember 12, 1947, directly with the Referee, in accordance
with Local Court Rule 208(a), amended by this court
on September 15, 1947, *infra*, and, pursuant thereto, the
order of reopening was made on November 25, 1947.

The Petitioner for Review, Commercial Wholesalers,
Inc., a California corporation, Debtor, while it does not
seriously deny the right of the Judge, as this word is
hereinafter defined, to reopen the Estate for good cause
shown, takes the position that, inasmuch as the Referee
had closed [69] this case by his final decree on Novem-

ber 12, 1947, he had no authority, power or jurisdiction to order this estate reopened on November 25, 1947, citing Volume 2, Collier on Bankruptcy (14th Ed.), page 1415, and *Heywood-Wakefield Co. v. Small* (C. C. A., 1st Cir., 36 Am. B. R. (N. S.) 965, 96 Fed. (2d) 496, to the effect that a Referee's authority to act as a court of bankruptcy under an order of general reference in a particular case ceases after he has made his report and the case is closed; and, therefore, that any petition to reopen the estate should have been directed to the district judge in the first instance, who might grant the petition or not, as he saw fit; and, if he granted it, thereafter refer the case to a referee, citing *Heywood-Wakefield Co. v. Small* (C. C. A., 1st Cir.), 36 Am. B. R. (N. S.) 965, 96 Fed. (2d) 496; and *Pollock v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

The *Heywood-Wakefield Co. v. Small* case (*supra*), was decided on April 14, 1938, prior to the amendment of the Bankruptcy Act by the Chandler Act of June 22, 1938, effective September 22, 1938, whereby the powers and the jurisdiction of the Referees in Bankruptcy became broadened. This case sets forth the rule and the better practice to be followed in the 1st Circuit as follows:

“We think it is clear that the reopening of a closed case in bankruptcy rests in the sound judicial discretion of the district judge and an application for that purpose should be made to him and not to the referee to whom the case was originally referred; that the latter's authority under the original order of reference ceased after he made his report and the case was closed; and that if the district judge orders the [70] case reopened, he should also enter an order referring the case to a referee, who should call a

new meeting of the creditors for the appointment of a new trustee. In re Rochester Sanitarium & Baths Co., 2 Cir., 222 F. 22, 23, 26, 27; In re Newton, 8 Cir., 107 F. 429, 431; 6 Remington, Sec. 2980; 1 Collier, p. 172."

At the time this decision was rendered, Chapter I, Sec. 1(7) defined a court as "court shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; and Chapter I, Sec. 1(16) defined a judge as "judge shall mean a judge of a court of bankruptcy, not including the referee." After the Chandler amendment became effective, while in Sec. 1(9) of Chapter I, the definition of a court was changed to read "court shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;" the definition of a "judge" in Sec. 1(20) of Chapter I remains unchanged.

While there are decisions of other circuits holding that a petition for reopening should be presented to a district judge, which cannot include a referee, these decisions are not binding on this court as a rule of decision under the doctrine of stare decisis, and it is not clear if these decisions, which seem to sustain the position of the Petitioner on Review here, were also made in contravention of, or in the absence of, any local rule of court which may or may not have been in conflict with the Bankruptcy Act.

Sec. 2(8) of Chapter II of the present Bankruptcy Act, as amended, gives the courts of the United States, created as courts of bankruptcy, which necessarily includes a referee of a court of bankruptcy under Sec. 1(9) of Chapter [71] I, *supra*, power to "close estates; . . .

and reopen estates for cause shown.” (Sec. 38(6) of the present Bankruptcy Act (jurisdiction of Referees) specifically gives the Referees power to perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as here-in otherwise provided;” (emphasis supplied).

Local Court Rule 208(a) of this court, Reopening Closed Estates, as amended on September 15th, 1947, and which is an old rule of this court, reads as follows:

“Rule 208(a) A Petition to reopen a closed estate shall be filed with, heard by, and ruled upon by the referee to whom the case in question was last referred, if he is still in office and if the reference to him has not been expressly revoked; otherwise such petition shall be filed with the clerk and the case shall thereupon be re-referred to a referee who shall hear and rule upon the petition to reopen the estate.”

General Order 12(1) of the present Bankruptcy Act, as amended, likewise provides that “a copy of the order referring a proceeding to a Referee shall forthwith be sent by mail to the Referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee.” (Emphasis supplied.)

There is nothing in the Bankruptcy Act, as amended, which specifically prohibits the passing upon the reopen-

ing [72] of a closed case by a Referee, and this court is of the opinion that the local rule of this court (*supra*) conferring such authority upon the Referee is a valid and binding rule of court. No formal procedure is prescribed or required for reopening an administration. *Schofield v. Moriyama* (C. C. A., Cal. 1928), 24 F. 2d 473, 11 Am. Bankr. Rep. N. S. 588.

The procedure to be followed in this district for the reopening of a closed estate, as directed by Local Rule 208(a), is one of procedure exclusively and was adopted for the expeditiousness of business; it in no way affects the substantive rights of the parties, and, regardless of whether or not the Referee denies or grants the petition to reopen an estate, there is still a review to the District Judge by way of a Petition for Review.

The ruling of this court is that the petition for reconsidering and reforming the final decree was properly presented to the Referee in the first instance.

The order of the Referee in Bankruptcy re-opening the case is affirmed. Investors Commercial Corporation, a corporation, petitioner, will prepare Judgment and file with the Court on or before April 9th, 1948.

Dated at Los Angeles, California, this second day of April, 1948.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Apr. 2, 1948. Edmund L. Smith, Clerk. [73]

In the District Court of the United States
Southern District of California
Central Division

No. 44685 O'C

In the Matter of

COMMERCIAL WHOLESALERS, INC.,
a California corporation,

Debtor.

JUDGMENT

This matter coming on for hearing before the Honorable J. F. T. O'Connor, United States District Judge, on this 22nd day of March, 1948, upon the petition of Commercial Wholesalers, Inc., a corporation, for review of the order of modification of final decree made by Hubert F. Laugharn, Referee, entered on the 24th day of December, 1947, petitioner being represented by his attorney, Alfred Gitelson, by Robert R. Ashton, Esquire, and respondent, Investors Commercial Corporation, a corporation, being represented by its attorneys Catlin & Catlin, by Frank D. Catlin, Esquire, and after arguments of counsel, and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that said petition for review be and the same is hereby overruled; and

It Is Further Ordered, Adjudged and Decreed that the order of modification of final decree made and entered by Hubert F. Laugharn, Referee, on the 24th day of December, 1947, be and the same is [74] hereby affirmed.

Done in open court this 6 day of April, 1948.

J. F. T. O'CONNOR

Judge

Judgment entered Apr. 6, 1946. Docketed Apr. 6, 1948. Book C. O. B. 50, page 45. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy.

[Endorsed]: Filed Apr. 6, 1948. Edmund L. Smith, Clerk. [75]

[Title of District Court and Cause]

NOTICE OF ENTRY OF JUDGMENT

To the Commercial Wholesalers, Inc., a California Corporation, Debtor, and to its attorney, Alfred Gitelson, Esq.:

You, and each of you, are hereby notified that the judgment signed by J. F. T. O'Connor, United States District Judge, confirming the order of modification of final decree made and entered by Hubert F. Laugharn, Referee, on the 24th day of December, 1947, has been entered in book 50, page 45 of the records of said court on the 6th day of April, 1948.

Dated: April 8, 1948.

CATLIN & CATLIN

By Frank D. Catlin

Attorneys for Investors Commercial Corporation,
a Corporation, Respondent [76]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 12, 1948. Edmund L. Smith, Clerk. [77]

In the District Court of the United States

Southern District of California

Central Division

No. 44685-O'C

In the Matter of

COMMERCIAL WHOLESALERS, INC.,

a California corporation,

Debtor.

COMMERCIAL WHOLESALERS, INC., a California
corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

a corporation,

Appellee.

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS FROM JUDGMENT AFFIRMING
MODIFICATION OF FINAL DECREE BY
REFEREE

Notice Is Hereby Given that Commercial Wholesalers, Inc., a corporation, the Debtor herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment herein, dated April 6th, 1948, and entered April 6, 1948, in book 50 at page 45 of the records of this court, affirming the Order of Modification

of Final Decree made and entered by Hubert F. Laugharn,
Referee, on the 24th day of [78] December, 1947.

Dated: April 29th, 1948.

ALFRED GITELSON

By Alfred Gitelson

Counsel for Commercial Wholesalers, Inc.,
Appellant

Address: 1151 So. Broadway, Los Angeles
15, California

To: Messrs. Catlin & Catlin

Attorneys for Investors Commercial
Corporation, a corporation, Appellee

Address: Title Insurance Building
433 So. Spring Street
Los Angeles 13, California [79]

[Affidavit of Service by Mail]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith,
Clerk. [80]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The appellant states that the points upon which it intends to rely on the appeal in this matter are as follows:

(1) The Judgment appealed from is erroneous for the reason that the Referee's Order which it affirms, purports to modify the Final Decree previously made and entered by the Referee; and the Referee had no jurisdiction, power or authority to reconsider, reform, modify or amend said Final Decree.

(2) The Judgment appealed from is erroneous for the reason that it affirms an Order made and entered by the Referee [81] based upon an Order of the Referee reopening this estate after said estate had been closed; and the Referee had no jurisdiction to order that this estate be reopened.

(3) The Judgment appealed from is erroneous for the reason that the Order of the Referee which said Judgment affirms was erroneous because the First Amended Plan of Arrangement constituted an accord and satisfaction extinguishing the obligations of the creditors.

Dated: April 29th, 1948.

ALFRED GITELSON

By Alfred Gitelson

Counsel for Commercial Wholesalers, Inc.,
Appellant [82]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith,
Clerk. [83]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 90, inclusive, contain full, true and correct copies of Petition in Involuntary Bankruptcy; Petition for Arrangement Under Section 321 in Pending Bankruptcy; Approval of Debtor's Petition and Order of Reference Under Section 321 of the Bankruptcy Act; Order Granting Leave to Propose Modification of Arrangement; Petition for Leave to Propose First Amended Plan of Arrangement; First Amended Plan of Arrangement; Application for Confirmation of First Amended Plan of Arrangement; Order Confirming Arrangement Under Chapter XI; Petition for Final Decree; Final Decree; Petition for Reconsidering and Reforming Final Decree Made on November 12, 1947; Order to Show Cause; Modification of Final Decree; Petition for Order Extending Time Within Which to Petition for Review; Petition for Review of Referee's Order by Judge; Certificate on Review; Statement of Facts and Points and Authorities of Commercial Wholesalers, Inc., re Petition for Review of Referee's Order by Judge; Opinion; Judgment; Notice of Entry of Judgment; Notice of Appeal to Circuit Court of Appeals from Judgment Affirming Modification of Final Decree by Referee; Statement of Points Upon which Appellant Intends to Rely on Appeal; Desig-

nation of Portions of Record to be Contained in Record on Appeal and Supplementary Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$22.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of May, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Endorsed]: No. 11947. United States Circuit Court of Appeals for the Ninth Circuit. Commercial Wholesalers, Inc., a corporation, Appellant, vs. Investors Commercial Corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 1, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11947

In the Matter of

COMMERCIAL WHOLESALERS, INC.,
a California corporation,

Debtor.

COMMERCIAL WHOLESALERS, INC., a California
corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,
a corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF THE PART OF THE RECORD WHICH IT DEEMS NECESSARY FOR THE CONSIDERATION THEREOF

The Appellant states that the points upon which Appellant intends to rely on appeal in this matter consist of and are contained in the Statement of Points Upon Which Appellant Intends to Rely on Appeal, appearing in the transcript of the record on appeal, and the Appellant does hereby adopt as its statement of points upon

which it intends to rely on appeal as those appearing in the transcript of the record.

The Appellant does hereby designate as the parts of the record which it thinks necessary for the consideration of this appeal, the whole of the record as certified to the Clerk of the above entitled Court herein, and does hereby designate for printing the entire of said transcript.

Dated: June 4th, 1948.

ALFRED GITELSON

By Alfred Gitelson

Counsel for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 7, 1948. Paul P. O'Brien,
Clerk.

No. 11947

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

JUL 24 1948

PAUL P. O'BRIEN,

ALFRED GITELSON,
1151 South Broadway, Los Angeles 13,
Counsel for Appellant.

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No. 11947

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLANT'S OPENING BRIEF.

Commercial Wholesalers, Inc., a corporation, appellant, respectfully submits this its appellant's opening brief upon appeal from the District Court of the United States for the Southern District of California, Central Division.

All italics and underscoring will be supplied unless otherwise noted. Reference to the Transcript of Record will be made by use of the letter "R" followed by appropriate page numbers.

I.

Statement of the Pleadings and Facts Disclosing the Basis Upon Which It Is Contended That the District Court Had Jurisdiction and That This Court Has Jurisdiction Upon Appeal to Review the Judgment in Question.

On December 31, 1946, a petition in involuntary bankruptcy was filed herein against appellant [R. 1-4]. Thereafter appellant filed herein a petition for arrangement under Section 321 in pending bankruptcy, which was filed February 14, 1947 [R. 5-7]. Thereafter, and on May 5, 1947, appellant filed a petition for leave to propose a first amended plan of arrangement under Chapter XI of the Acts of Congress relating to Bankruptcy, together with a first amended plan of arrangement [R. 10-19], and an order herein was granted permitting appellant to propose said modification [R. 9]. Thereafter, and on June 5, 1947, an order was entered herein confirming said arrangement under Chapter XI of the Acts of Congress relating to Bankruptcy [R. 21-25]. On November 12, 1947, a final decree was made and entered herein by the Referee [R. 28-29]. Thereafter, and on December 24, 1947, and pursuant to a petition and order to show cause, said Referee made and entered an order herein modifying said final decree [R. 30-37]. On January 14, 1948, appellant filed herein its petition for review of said Referee's order modifying said final decree [R. 38-46]. On April 2, 1948, the District Court filed its opinion affirming the order of said Referee [R. 58-62] and on April 6, 1948, made and entered its judgment affirming said order [R. 63-64].

Since the principal place of business of appellant at the time of the filing of said petition in involuntary bankruptcy was in the City of Los Angeles, County of Los Angeles,

State of California, it was within the territorial jurisdiction of the United States District Court for the Southern District of California, Central Division. District Courts of the United States are courts of bankruptcy (U. S. C., Title 11, Chapter 1, Section 1, subsection (10)). Courts of bankruptcy are invested with jurisdiction at law and in equity as will enable them to exercise original jurisdiction under the Bankruptcy Act (U. S. C., Title 11, Chapter 2, Section 11). Chapters I-VII of the Bankruptcy Act are incorporated by reference into Chapter XI of the Acts relating to Bankruptcy (11 U. S. C., Section 702). District Courts of the United States have exclusive jurisdiction of a debtor and his property, where the debtor files a petition therein under Chapter XI of the Acts relating to Bankruptcy (11 U. S. C., Section 711). It is therefore respectfully submitted that the District Court had jurisdiction of this matter.

Thereafter, and on May 4, 1948, appellant filed a Notice of Appeal to this Court from the judgment of the District Court affirming said modification of said final decree by the Referee [R. 65-66]. The United States District Court for the Southern District of California, Central Division, is within the territorial jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Courts of Appeal of the United States are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, and in controversies arising in proceedings in bankruptcy (U. S. C., Title 11, Chapter 4, Section 27).

From the foregoing pleadings and facts, it is respectfully submitted that said District Court had jurisdiction to enter the judgment appealed from, and that this Honorable United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction on appeal to review said judgment.

II.

Statement of the Case, Together With Questions Involved, and the Manner in Which They Are Raised.

In this case a petition in involuntary bankruptcy was filed against appellant [R. 2-4]. Appellant then filed a petition for arrangement under Section 321 of the Acts of Congress relating to bankruptcy [R. 5-7], said petition was by the United States District Court for the Southern District of California, Central Division, approved, and the matter was referred to Hubert F. Laugharn, Esq., one of the Referees in Bankruptcy of said Court, to take such further proceedings as required by the Acts of Bankruptcy [R. 8]. Thereafter appellant petitioned the District Court for leave to propose a first amended plan of arrangement and filed said plan [R. 10-19] pursuant to an order of said Court [R. 8]. The plan of arrangement provided in part that all unsecured debts of appellant should be settled and satisfied by payment to the holders thereof of forty per cent of their respective claims, with certain provisions attaching thereto [R. 15-16].

Thereafter, and pursuant to application by the debtor [R. 19-20], an order was made and entered herein confirming said plan or arrangement [R. 21-25]. Thereafter, and pursuant to appellant's petition [R. 25-27], a final decree was made and entered by the Referee which among other things ordered, adjudged and decreed that all creditors of appellant whose debts or claims were scheduled or filed should be enjoined and debarred from prosecuting or maintaining any action, suits or proceedings at law or in equity against the debtor or its predecessors [R. 28-29].

Thereafter, the appellee filed and caused to be issued a petition for reconsidering and reforming said final decree and an order to show cause thereon wherein appellee prayed for an order of the Referee reconsidering and reforming the final decree by eliminating and deleting the words "predecessors" therefrom [R. 30-33]. Pursuant to said petition and order to show cause, and on December 24, 1947, the Referee made and entered his order whereby he purported to modify said final decree by striking, deleting and eliminating therefrom the word "predecessors" [R. 34-35].

Thereafter appellant took a review of said Referee's order modifying said final decree to the District Court [R. 38-57]. The District Court thereupon rendered an opinion confirming said order [R. 58-62] and thereafter, pursuant to said opinion, made and entered its judgment wherein it did affirm said order of modification of said final decree made and entered by the Referee on the 24th day of December, 1947 [R. 63].

Thereafter, and on May 4, 1948, appellant filed its Notice of Appeal whereby it did appeal to this Court from said judgment.

The questions involved on this appeal are:

(1) Where a referee has made and entered a final decree or other final order, does the referee thereafter have the power to make or enter an order amending or modifying said final decree, or is that exclusive power vested by law and rule in the United States District Judge to review such final decree?

(2) Where a plan of arrangement under Chapter XI of the Acts of Congress relating to Bankruptcy provides that all of the unsecured debts of the debtor shall be settled and satisfied by the payment of certain amounts set forth in the plan, and the plan is thereafter carried out and the amounts are paid, is there an accord and satisfaction of said debts which acts as a discharge of any obligation of the debtor's predecessor's in interest to pay said obligations?

III.

Specification of Errors.

In accordance with the rules of this Honorable Court appellant hereinafter sets forth its specification of errors relied upon, which are numbered and set out separately.

FIRST

SPECIFICATION OF ERROR.

The judgment appealed from is erroneous for the reason that it affirms an order of the Referee, which order purports to modify a final decree previously made and entered by the Referee, and the Referee had no jurisdiction, power or authority to modify said final decree, all as hereinafter more particularly set forth.

The final decree in this case was made and entered herein on November 18, 1947 [R. 29]. In said final decree the Referee among other things ordered, adjudged and decreed:

"That all creditors of said Commercial Wholesalers, Inc., a California corporation, Debtor, in the above entitled matter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and assigns, be and each of them are hereby forever en-

joined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity, against the debtor, its successors, predecessors or assigns, based upon any such debt or claim, scheduled or filed herein, excepting only debts excepted by law from discharge.” [R. 29.]

Thereafter appellee filed a petition with the Referee to reconsider and reform said final decree, which was filed November 25, 1947 [R. 30-32]. Pursuant to the appellee’s petition, the Referee issued to appellant an order to show cause requiring it to appear and show cause before the Referee on December 4, 1947, why the said final decree should not be reconsidered and reformed in accordance with the prayer of the appellee [R. 33]. The appellee’s said petition and the order to show cause came on for hearing on the 4th day of December, 1947, before the Referee, and after hearing the arguments of counsel and taking the matter under consideration, the Referee did, on December 24, 1947, make and enter an order whereby and under the terms of which he purported to modify that portion of said final decree above quoted by eliminating therefrom the word “predecessors,” thus causing said quoted portion of said final decree to read as follows :

“That all creditors of said Commercial Wholesalers, Inc., a California corporation, debtor in the above entitled matter, whose debts or claims against said debtor have been scheduled or filed herein, their heirs, executors, administrators, successors and as-

signs be, and each of them are hereby forever enjoined and debarred from pursuing or attempting to pursue, commencing, prosecuting or maintaining any actions, suits or proceedings at law or in equity against the debtor, its successors or assigns, based upon any such debt or claim scheduled or filed herein, excepting only debts excepted by law from discharge.”

[R. 35.]

No review or appeal of any kind or description was ever taken from the final decree of November 12, 1947, and there were no proceedings of any kind had in this matter from November 12, 1947, to December 24, 1947, save and except as hereinbefore specifically set forth.

SECOND
SPECIFICATION
OF ERROR.

The judgment appealed from is erroneous for the reason that it affirms an order of the Referee, which order purports to modify a final decree in an arrangement proceeding under Chapter XI of the Bankruptcy Act by eliminating from said final decree an order enjoining unsecured creditors of the debtor from prosecuting or maintaining actions, suits or proceedings against the predecessors of the debtor upon debts or claims scheduled or filed in said proceeding; which is contrary to law for the reason that the debtor's first amended plan of arrangement which was confirmed herein provided that the unsecured debts of the debtor should be settled and satisfied by payment of the amount set forth in the Plan, which amounts were paid, and therefore constituted an accord and satisfaction of said debts and claims, and acted as a discharge of the debtor's predecessors; all as hereinafter more specifically set forth.

The debtor's first amended plan of arrangement which was filed herein provided that the debtor's unsecured claims and debts should be settled and satisfied by payment to the holders thereof of forty per cent of their respective claims [R. 15-16]. This first amended plan of arrangement was confirmed by the Court [R. 21-25] and a final decree entered herein reciting that all the debts of the debtor scheduled herein or upon which claims had been filed had been *fully settled, satisfied, paid and discharged* [R. 28]. Said final decree, among other things, enjoined all of said creditors of the debtor from prosecuting or maintaining any suits or proceedings against the debtor or its predecessors based upon any such debt or claim [R. 29].

Thereafter, and on December 24, 1947, the Referee made and entered an order modifying said final decree by eliminating the word "predecessors" from the final decree [R. 35]. Thus, in effect, refusing to enjoin the creditors whose debts and claims had been "fully settled, satisfied, paid and discharged" [R. 28] from prosecuting said debts or claims against predecessors of the debtor. Since the creditors agreed that their claims should be settled and satisfied by payment to them of forty per cent of their respective claims [R. 15-16], and since the said claims were fully settled, satisfied, paid and discharged [R. 28], the Court erred in entering its judgment affirming the order of said Referee modifying the final decree so as to permit the creditors to maintain actions upon claims which had been paid.

IV.

ARGUMENT.

- (1) With Reference to Appellant's First Specification of Error, It Is Respectfully Submitted That the Referee Had No Jurisdiction, Power or Authority to Reconsider, Reform, Modify or Amend Said Final Decree.

The rule in the Circuit Court of Appeals, Ninth Circuit, is well settled that once a Referee has entered an order, the Referee's power over the order is ended. The remedy of review is exclusive, and the Referee may not himself review or change the order.

In re Faerstein, 58 F. (2d) 942.

In the *Faerstein* case cited above, the Referee made and entered a "Turnover Order" and no review thereof was sought. Nine days thereafter the Referee made an order that the turnover order be set aside and annulled. On review, the order setting aside and annulling the turnover order was reversed. On appeal to the Circuit Court, wherein the District Court was affirmed, the Court propounded this question:

"The issue concisely is, Did the Referee have the power, after having made and entered final findings and conclusions, and after the 'Turnover Order' was issued, to set the same aside, or was the exclusive power vested by law and rule in the United States District Judge to review such order?"

In holding that a Referee had no power to amend his order once it was entered, the Circuit Court said in part:

"Referees are invested with certain powers, 'subject always to a review by the judge.' Section 66, title

11, U. S. C. A. The referee has no independent judicial authority. He is not a distinct court, and has no power not conferred by order of reference, by law or general orders. 'The district courts of the United States in the several States * * * are made courts of bankruptcy.' 11 U. S. C. A., Section 11. A court is said by Blackstone to be a vested judicial power to adjudicate issues between contending factors, and is composed of the actor, or plaintiff; the *reus*, or defendant; and the *judex*, the judicial power which examines the truth of the contending parties and applies the remedy. A referee is an instrumentality of the Court, with limited powers. His jurisdiction is defined by section 66, title 11, U. S. C. A., *supra*, and his duties are given in section 67. *Neither of these sections gives him the power to review and set aside the order made, and in issue on this appeal.*

"General Order No. 27 of the Supreme Court (11 USCA, Section 53) provides that, when a review is sought of any order of the referee, a petition shall be filed with the referee setting forth the error complained of and the referee shall certify to the United States District Judge the question presented, a summary of the evidence, and finding and the order of the referee thereon. The procedure is specific and clearly stated. Rule 84 of the trial court requires that a petition for review, as provided in General Order 27, *supra*, must be filed with the referee within ten days from the date of notice of such order.

"When an order is entered, the referee's power over the order is ended. The remedy is exclusive and he may not review or change the order. In re Russell (D. C.), 105 F. 501; In re Wister & Co. (D. C.), 232 F. 898; also, In re Greek Mfg. Co. (D. C.), 164 Fed. 211; In re Marks (D. C.), 171 F. 281; In re Avoca

Silk Co. (D. C.), 241 F. 607; Matter of J. W. Renshaw's Sons, Bankrupt (D. C.), 3 F. (2d) 75; Matter of Wm. L. David (C. C. A.), 33 F. (2d) 748; David v. Hubbard, 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585.

"That the procedure of review is plainly defined and power limited in the interest of regularity and for the common good is clearly stated by Judge Sawtelle of this court, sitting as District Judge, *In re* Octave Mining Co. (D. C.), 212 Fed. 457, 458, as follows: 'It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed. * * *'"

The rule stated in the foregoing case still appears to be the law in this District in view of the fact that it was cited with approval in the later case of

Grandee v. Arizona Wax Paper Co. (C. C. A., 9th Cir.), 90 F. (2d) 801.

- (2) With Reference to Appellant's Second Specification of Error, the Order Amending the Final Decree Was Erroneous Because the First Amended Plan of Arrangement and Payment in Accordance Therewith Constituted an Accord and Satisfaction, Extinguishing the Obligations of the Creditor.

The First Amended Plan of Arrangement herein provided that the unsecured debts of the debtor should be settled and satisfied by payment to the holders thereof of forty per cent of their respective claims. Since a Final Decree was admittedly entered herein, reciting that all of the debts of the debtor have been fully *settled, satisfied, paid and discharged* [R. 28-29], it cannot be denied but

that the Plan of Arrangement was consummated and the creditors paid their forty per cent of their claims as provided in the Plan. That being true, the original obligations became extinguished by reason of the accord and satisfaction.

An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

California Civil Code, Sec. 1521.

Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

California Civil Code, Sec. 1522.

Acceptance by the creditors of the consideration of the accord *extinguishes the obligation*, and is called satisfaction.

California Civil Code, Sec. 1523.

In the case of *Russell v. Riley etc.*, 82 Cal. App. 728, at 737, the court said:

“If the consideration be considered as one of *accord and satisfaction*, then the rule is well settled that where an agreement to accept in full payment a sum less than the amount in dispute is shown to have been fully executed by the payment and acceptance of the lesser sum, *the original obligation is thereby extinguished.*”

In the *Estate of Connell*, 121 Cal. App. 703, Mrs. Connell and her deceased husband were jointly liable on an obligation to the plaintiff. Plaintiff filed suit against Mrs. Connell individually (she being administratrix of

her deceased husband's estate) and also filed a claim in the estate for the same obligation. The plaintiff recovered judgment against Mrs. Connell individually, and subsequently accepted from her one-half of the judgment, plus her agreement not to appeal from the judgment, in *payment and satisfaction* of the judgment. Later, plaintiff filed this action against the estate for the balance of the claim. In holding that the accord with Mrs. Connell extinguished the debt and released the estate of Mr. Connell from further payment to the plaintiff, the court said in part:

“Had the judgment in the civil action been paid in full, appellant could not have recovered anything under the claim filed in the estate. Here we have a situation in which, by accord and satisfaction, the consideration being the payment of one-half of the amount of the judgment on or before the date specified, and the further consideration that the judgment debtor would not prosecute an appeal, the judgment was satisfied, and, by the agreement, the transaction included a settlement not only of the judgment, but of the note and claim in the estate. We hold that, under these conditions, appellant ceased to have any further rights to the recovery of money by reason of the note, and that the settlement extinguished the claims in the estate *as fully as though judgment had been paid in full.*”

In the case of *B & W Engineering Co. v. Bean*, 23 Cal. App. 164, at 170, the court said in part:

“The phrase ‘accord and satisfaction’ as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a preexisting agreement between the same parties. More minutely defined, an agreement of accord and satisfac-

tion is one whereby one of the parties having a right of action against the other, upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of said right of action different from and usually less than that which might be recovered upon the original obligation (Civil Code, Section 1521). *The effect of such agreement when executed is to extinguish the antecedent liability* (Civil Code, Section 1523)."

In the case of *Keeling Corp., Ltd., v. Pacific Products, Inc.*, 138 Cal. App. 180, the District Court of Appeal held as follows:

"There is a distinction between a discharge in bankruptcy and a composition settlement and the consequences which flow therefrom. A composition with creditors partakes of the nature of a contract, in a measure superseding and outside of the bankruptcy proceedings. It is an offer and acceptance, and the respective rights of the bankrupt and the creditors are fixed by the terms of the offer upon its confirmation. Whether, therefore, a discharge in bankruptcy merely bars the remedy or completely extinguishes the legal obligation is a matter of academic interest, as the composition agreement by its express terms provided the sum paid was 'in full of such creditors' claims' against the corporation. The stockholders were released therefore not by a discharge in bankruptcy but under an express contract. *This agreement completely extinguished and wiped out the entire legal obligation of the company.* It has been universally held that the constitutional liability of stockholders of a corporation for its debts is released by the full performance of a voluntary composition agreement between the corporation and its creditors. (Citing *San Jose Savings Bank v. Pharis*, 58 Cal. 380.)

“Whatever satisfies or extinguishes the debt as to the corporation, extinguishes also the liability of the stockholders, for the reason that there can be only one satisfaction of the debt (*Young v. Rosenbaum*, 39 Cal. 646, 654; 6a Cal. Jur. 1018; *O’Connell Shoe Co. v. Benson Cooperative Mechanical Co.*, 175 Minnesota 382). The statutory liability of a stockholder is dependent upon the actual existence of an indebtedness (*Ellsworth v. Bradford*, 186 Cal. 316). Here, as above indicated, the entire indebtedness has been discharged, satisfied and wiped out. There was, therefore, no debt upon which the alleged statutory liability could be based.”

See also to the same effect:

San Jose Savings Bank v. Pharis, 58 Cal. 380, and
Young v. Rosenbaum, 39 Cal. 646.

V.

Conclusion.

From the foregoing it is respectfully submitted:

(1) That having once made and entered his final decree herein, the Referee had no jurisdiction, power or authority thereafter to reconsider, reform, modify or amend said final decree, and his order of December 24, 1947, purporting so to do was in excess of his jurisdiction; and the judgment of the District Court herein affirming said order is therefore erroneous and should be reversed.

(2) That the Referee’s order of December 24, 1947, purporting to modify the final decree herein by deleting the word “predecessors” from the final decree was erroneous because the first amended plan of arrangement providing for the settlement and satisfaction of the debtor’s un-

secured obligations by payment of a percentage thereof to its creditors, and the actual payment thereof, constituted an accord and satisfaction between the debtor and its creditors; that the provisions in the final decree prohibiting the creditors from prosecuting actions upon these extinguished liabilities was lawful and proper; and that the judgment appealed from herein is erroneous and contrary to law in so far as the same affirms said Referee's order of December 24, 1947, and for that reason should be reversed.

Respectfully submitted,

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By ALFRED GITELSON,

Counsel for Appellant.

No. 11947

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

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No. 11947

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLEE'S BRIEF.

Investors Commercial Corporation, appellee, respectfully submits this its brief upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Appellant submits two questions on this appeal and appellee answers them accordingly.

Question No. 1 and Assignment of Errors in Connection Therewith Being: "Where a Referee Has Made and Entered a Final Decree or Other Final Order, Does the Referee Thereafter Have the Power to Make or Enter an Order Amending or Modifying Said Final Decree, or Is That Exclusive Power Vested by Law and Rule in the United States District Judge to Review Such Final Decree?"

Argument.

Section 2 of Chapter II of the Bankruptcy Act of 1938, commonly known as the Chandler Act (United States

Code, Title 11, Chapter 2, Section 11), provides as follows:

“The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . .”

and subsection 8 thereof provides:

“Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown”;

Section 1 of Chapter I of the Bankruptcy Act of 1938, commonly known as the “Chandler Act” (U. S. Code, Title 11, Chapter 1, Section 1), provides, among other things, as follows:

“The words and phrases used in this Act and in the proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

Subsection (9) thereof: ‘Court’ shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending.”

Section 38 of said Bankruptcy Act provides for the jurisdiction of referees as follows:

“Referees are hereby invested, subject always to a review by the judge with jurisdiction to (Subsection 6) perform such of the duties as are by this act conferred on courts of bankruptcy including those incidental to ancillary jurisdiction and as shown to be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided.”

General Order 12 (1) of the present Bankruptcy Act, as amended, likewise provides that:

“A referee in bankruptcy, after reference, can do anything that a judge can do, except adjudicate voluntary petitions; commit for contempt; hear jury trial when demanded; extradite a bankrupt; enjoin a court; transfer cases; and designate newspapers. There is doubt whether a referee can reopen closed cases. The better view is that he cannot. *However a local District Rule gives the referee jurisdiction to reopen cases.*” (Emphasis supplied.)

John Mitchell, Bankrupt, 54 A. B. R. 476, 478.

“Although there has been considerable authority that a referee, once having made an order, has no power to reconsider and amend or vacate it, *the better view seems to be that the referee, as a court, has such power.*” (Emphasis supplied.)

Vol. 2, Collier on Bankruptcy, 14 Ed. page 1426.

The same question was up before the United States Circuit Court of Appeals (second circuit) in 1935 in the matter of *Potasch Bros. Co. Inc., Bankrupt*, 79 F. (2d) 613, 30 A. B. R. (N. S. 225, 231), and Judge L. Hand

in his opinion considered, reviewed and discussed all of the existing authorities on the problem including the case of *Farestein*, 58 F. (2d) 942, and concluded his decision by the following:

“We hold that a referee has the same power over his orders as the district judge has over his.”

There is nothing in the Chandler Bankruptcy Act, as amended, which specifically prohibits the passing upon the reopening of a closed case by a Referee and therefore the local rule of the District Court of California, Southern District, Central Division (*supra*), conferring such authority upon the Referee is a valid and binding rule of court. No formal procedure is prescribed or required for reopening an administration.

Schofield v. Moriyama (C. C. A. Cal. 1928), 24 F. (2d) 473, 11 Am. Bk. Rep. N. S. 558.

The procedure to be followed in the Southern District of California for the reopening of a closed estate, as directed by Local Rule 208(a), is one of procedure exclusively and was adopted for the expeditiousness of business; it in no way affects the substantive rights of the parties, and, regardless of whether or not the Referee denies or grants the petition to reopen an estate, there is still a review to the District Judge by way of a Petition for Review.

Question No. 2 and Assignment of Errors in Connection Therewith Being: "Where a Plan of Arrangement Under Chapter XI of the Acts of Congress Relating to Bankruptcy Provides That All of the Unsecured Debts of the Debtor Shall Be Settled and Satisfied by the Payment of Certain Amounts Set Forth in the Plan, and the Plan It Thereafter Carried Out and the Amounts Are Paid, Is There an Accord and Satisfaction of Said Debts Which Acts as a Discharge of Any Obligation of the Debtor's Predecessors in Interest to Pay Said Obligation?"

Argument.

Chapter III, Section 16 of the Chandler Bankruptcy Act (U. S. Code, Title 11, Chapter 3, Section 34), provides:

"The liability of a person who is a co-debtor with or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

Chapter XI, Section 302 of the Chandler Bankruptcy Act (U. S. Code, Title 11, Chapter 11, Sections 701-702), provides:

"The provisions of Chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter."

We must, therefore, in construing the provisions of said Chapter XI refer to and include Chapter III and Section 16 thereof, as they are all included therein.

The Intention and Purpose of the Statute Is to Make a Discharge in Bankruptcy Personal to the Bankrupt and Not to Release Any Other Parties, Who May in Any Way Be Liable With Him.

“Discharge does not constitute payment.”

American Improvement Co. v. Lilenthal, 43 Cal. App. 80;

8 C. J. S., pp. 1491, 1492.

“Ordinarily a discharge in bankruptcy of a debtor does not affect the liability of one liable with the bankrupt as a co-debtor, surety or guarantor.”

8 C. J. S., 1546.

“A discharge in bankruptcy, being purely personal to the bankrupt, releases the Bankrupt from personal liability only.”

8 C. J. S., 1559;

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

“Congress has the power to say from what debts a Bankrupt shall be discharged and from what liabilities he shall not be discharged, and it has exercised such power in specific provisions of the Bankruptcy Act.”

8 C. J. S., 1497.

“A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the Court, and, after notice

and hearing, if approved by the Court, an order is made confirming the same.”

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 83.

“Confirmation is in effect a discharge. Its effect is to supersede the bankruptcy proceedings, and reinvest the Bankrupt with all his property free from the claims of his creditors.”

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 83.

“The composition has no more effect than a discharge would have under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in Sec. 17 of the Act. A discharge, however, is not a payment or an extinguishment of the debts, it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not itself invalid. The discharge has merely destroyed the remedy, but not the indebtedness.”

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

“Undoubtedly, the composition released Hammond from further personal liability to pay the judgment obtained against him in the action, but it did not affect the security afforded by his lien.”

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

“This section is declaratory of a general principle of law. It results from two well-settled doctrines: (1) that a discharge in bankruptcy affects only the personal liability of the debtor, and not the

liability of other persons, and (2) that such a discharge is by operation of law and not by consent: It is well settled that the principle thus stated applies only to the discharge in bankruptcy and not to any act of the parties that may be construed as effecting a release.”

Vol. I, Collier on Bankruptcy (14th Ed), pp. 1522, 1523.

“Since the creditor still has the right to collect from any other person liable for the debt, a pending suit against such other person is not affected by the discharge. The section is applicable even though the discharge is effected with the consent of a majority of the creditors, as by an arrangement, or the discharge is obtained in corporate reorganization proceedings under Chapter X. The right to execution or supplementary proceedings against the co-debtor is not affected by the bankruptcy proceedings.”

Vol. I, Collier on Bankruptcy (14th Ed.), pp. 1524, 1525.

“Nor is the creditor prejudiced by filing proof of his claim or by accepting a dividend on liquidation in bankruptcy of the debtor’s estate or in a composition under the former composition provisions of the Bankruptcy Act.”

Vol. I, Collier on Bankruptcy (14th Ed.), p. 1526.

“An arrangement or reorganization plan purporting to release a surety or guarantor should not be attacked collaterally in a suit to recover from the surety or guarantor. While the possibility of a collateral attack is not necessarily foreclosed under *Stoll v. Gottlieb*, it is advisable that the dissenter apply for a modification of the arrangement or reorganization

plan, or move to vacate a court order, if any, restraining a suit on the guaranty, and if denied the only remedy is by appeal.”

Vol. I, Collier on Bankruptcy (14th Ed.), p. 1530.

“The acceptance of a composition and even the voting in support of it, does not discharge the guarantor of the obligation.”

A. Klipstein & Co. v. Henry Lipschitz, Vol. X, A. B. R. (N. S.), pp. 600, 602.

“It must be noted also that there is a difference between a common-law composition and a composition in bankruptcy. In the former the creditors voluntarily release the principal debtor and therefore release co-debtors, while in the case of a bankruptcy composition the discharge is by operation of law and not by act of the creditor who assents to the composition.”

Barker v. Ackers, 29 Cal. App. (2d) 162, 175.

“Upon the institution, as in the instant case, of proceedings for corporate reorganization under Section 77b of the Bankruptcy Act, the creditor is forced to cooperate in the proceedings for a composition or a corporate reorganization, for whether or not he appears or consents to a composition or corporate reorganization, the bankrupt or debtor, as the case may be, may be discharged. The creditor is without choice but to attempt to obtain or assent to the composition or plan of reorganization which he deems the most favorable. For this reason, undoubtedly, *it has been repeatedly held that a composition in bankruptcy in no way discharges the co-debtor, whether or not he consents to the composition.*” (Emphasis supplied.)

Barker v. Ackers, 29 Cal. App. (2d) 162, 175.

Conclusion.

From the foregoing it is respectfully submitted:

(1) That the order of amendment made by the Referee which order was confirmed by the Honorable J. F. T. O'CONNOR, United States District Judge, was proper.

(2) That the Bankruptcy Court has no authority to release co-debtors, sureties or guarantors of the bankrupt and that there is no accord and satisfaction by virtue of proceedings under Chapter 11 of the Bankruptcy Act.

CATLIN & CATLIN,
FRANK D. CATLIN,
HENRY W. CATLIN,

*Attorneys for Investors Commercial Corporation,
Appellee.*

No. 11947

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,
Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,
Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

CATLIN & CATLIN,
FRANK D. CATLIN,
HENRY W. CATLIN,
433 South Spring Street, Los Angeles 13,
Attorneys for Investors Commercial Corporation,
Appellee.

FILED
SEP 10 1948

PAUL P. O'BRIEN, -

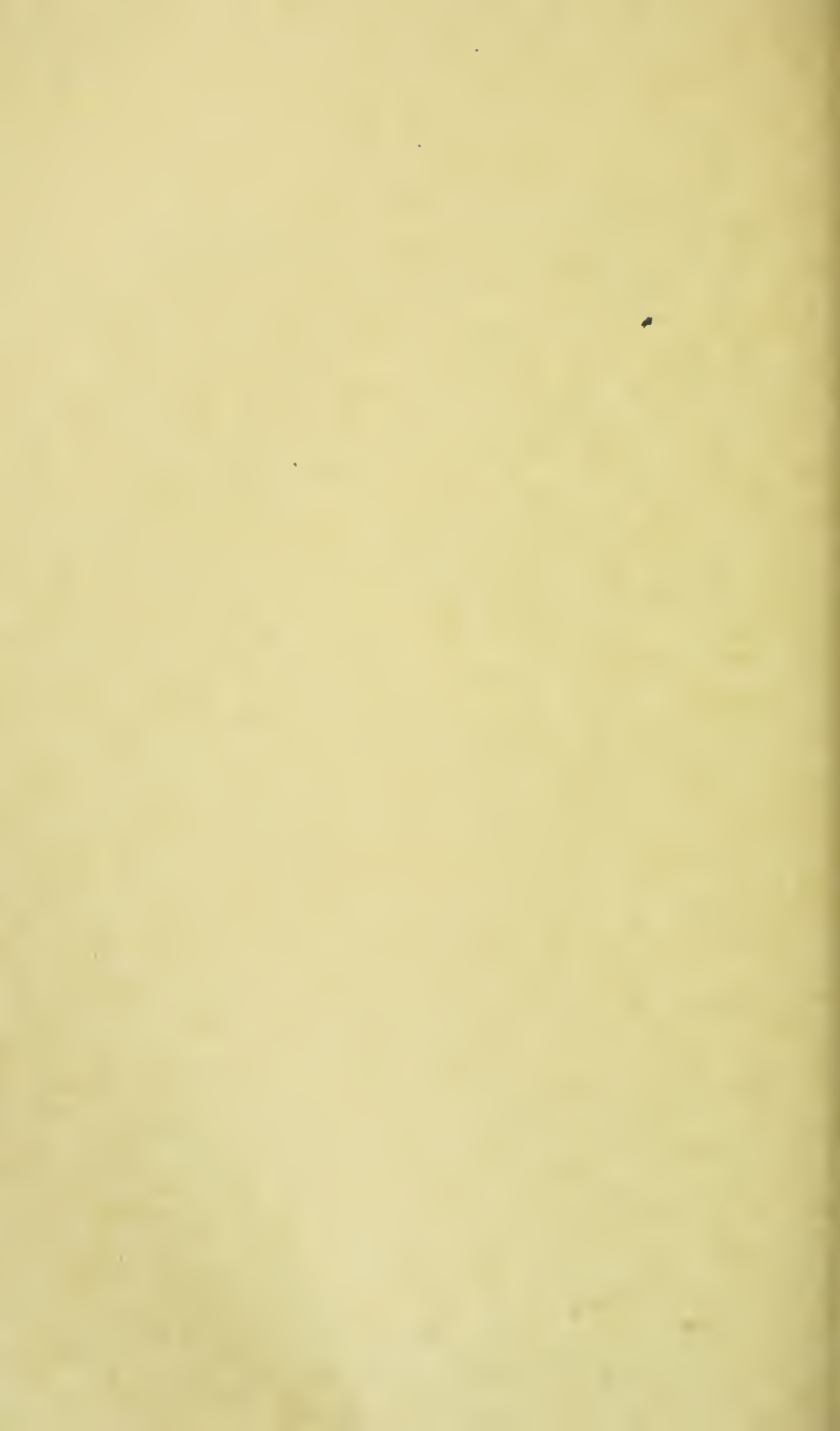


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No. 11947

IN THE

United States Court of Appeals

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COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

Investors Commercial Corporation, Appellee, files its supplemental brief, which takes the place of page 3 of its original brief for the reason that some citations were inadvertently omitted and respectfully requests that said supplemental brief may be used with and in connection with Appellee's original brief heretofore filed.

Section 38 of said Bankruptcy Act provides for the jurisdiction of referees as follows:

“Referees are hereby invested, subject always to a review by the judge with jurisdiction to (Subsection 6) perform such of the duties as are by this act conferred on courts of bankruptcy including those incidental to ancillary jurisdiction and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided.”

Rule 207(b) of the Local Bankruptcy Rules of the District Court of the United States, Southern District of California, provides:

“The authority of a referee to whom a case has been referred by an order of general reference shall not terminate when the case is concluded before him but shall continue so long as he remains in office, unless the reference to him is expressly revoked.”

Rule 208(a) of the Local Bankruptcy Rules of the District Court of the United States, Southern District of California, as amended September 15, 1947, provides:

“A petition to reopen a closed estate shall be filed with, heard by, and ruled upon by the Referee to whom the case in question was last referred, if he is still in office and if the reference to him has not been expressly revoked; otherwise such petition shall be filed with the Clerk and the case shall thereupon be re-referred to a referee who shall hear and rule upon the petition to reopen the estate.”

General Order 12(1) of the present Bankruptcy Act, as amended, likewise provides that:

“A copy of the order referring a proceeding to a Referee shall forthwith be sent by mail to the Ref-

eree, or be delivered to him personally by the clerk or other officer of the court. *And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee.*" (Emphasis supplied.)

"A referee in bankruptcy, after reference, can do anything that a judge can do, except adjudicate voluntary petitions; commit for contempt, hear jury trial when demanded; extradite a bankrupt; enjoin a court; transfer cases; and designate newspapers. There is doubt whether a referee can reopen closed cases. The better view is that he cannot. *However a local District Rule gives the referee jurisdiction to reopen cases.*" (Emphasis supplied.)

John Mitchell, Bankrupt, 54 A. B. R. 476, 478

"Although there has been considerable authority that a referee, once having made an order, has no power to reconsider and amend or vacate it, *the better view seems to be that the referee, as a court, has such power.*" (Emphasis supplied.)

Vol. 2, Collier on Bankruptcy, 14 Ed. page 1426.

The same question was up before the United States Circuit Court of Appeals (Second Circuit) in 1935 in the matter of *Potasch Bros. Co. Inc., Bankrupt*, 79 F. (2d) 613, 30 A. B. R. (N. S. 225, 231), and Judge L. Hand

Respectfully submitted,

CATLIN & CATLIN,
FRANK D. CATLIN,
HENRY W. CATLIN,

*Attorneys for Investors Commercial Corporation,
Appellee.*

No. 11948

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JUL -2 1948

PAUL P. O'BRIEN,
CLERK

No. 11948

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANDREW L. JOHNSON and CHARLES W.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

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MATHEWSON,

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Seattle 1, Washington.

Attorneys for Appellee:

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FRANK PELLEGRINI,

1017 U. S. Court House,
Seattle 4, Washington. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1746

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE, d/b/a JOHNSON & GUN-
STONE, a co-partnership,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Come now the plaintiffs by their attorneys, Ryan,
Askren & Mathewson, and for complaint against the
defendant, allege as follows:

I.

This is an action brought under and by virtue of
Title IV of the Legislative Re-organization Act of
1946, Public Law 601, 6 U.S.C. Congressional Serv-
ice 778, as hereinafter more fully appears.

II.

The plaintiffs herein are individuals doing busi-
ness as a co-partnership, and the said plaintiffs are
residents of Jefferson County, in the State of
Washington.

III.

The plaintiffs herein are owners of certain tide-
lands and tideflats located at Discovery Bay, in the

State of Washington, and the said plaintiffs at the present time, and for many years, have conducted a commercial clam farm on the said tidelands; that the said plaintiffs have expended a large sum of money in the acquisition and development of the said clam farm, and have over the past several years developed an extensive trade in the [2] harvesting and marketing of clams from the said tidelands.

IV.

That on or about the first day of December, 1945, the United States Navy anchored approximately twelve (12) large United States naval vessels in the waters of said port, Discovery Bay, adjacent to the above described lands of the plaintiffs; and that the said vessels remained there for many weeks thereafter.

V.

The personnel, men and officers of the United States stationed upon said vessels did wilfully or negligently discharge sewage, oil and other noxious and waste materials into the said port, Discovery Bay, thereby grossly polluting the waters of said bay, and polluting the plaintiff's clam lands, which pollution made the clams thereupon unfit for human consumption. That as a result of the afore-said pollution, the Department of Health of the State of Washington on the tenth day of December, 1945 issued an order prohibiting the taking of clams from the plaintiffs' lands for sale to the public, which order continued in full force and effect until after the expiration of the plaintiffs' clam digging

season, which terminated on or about the 31st of March, 1946.

VI.

That as a result of the aforesaid pollution and the order issued by the State of Washington, which was occasioned by said pollution, the plaintiffs were prevented from digging and marketing their clams for the period between the tenth of December, 1945, and the thirty-first of March, 1946. The plaintiffs thereby lost profits from the sale of said clams in the amount of Twenty-four Thousand (\$24,000.00) Dollars. [3]

VII.

As a direct result of the plaintiffs being prevented by said pollution from fulfilling the orders of their customers, the plaintiffs have lost many of the customers to whom they formerly sold clams, and their business has been permanently damaged thereby in the sum of Twelve Thousand (\$12,000.00) Dollars, and the plaintiffs' clam lands, as a result of said pollution, have been permanently damaged in the sum of Ten Thousand (\$10,000.00) Dollars.

Wherefore, the plaintiffs pray that they be awarded judgment against the defendant in the sum of Forty-six Thousand (\$46,000.00) Dollars, plus their costs and disbursements herein expended and plus their attorneys' fees as allowed under Title IV of the Legislative Re-organization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778.

RYAN, ASKREN &
MATHEWSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Andrew L. Johnson, upon oath deposes and says:

That he is one of the plaintiffs in the above entitled action, that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

/s/ ANDREW L. JOHNSON.

Subscribed and sworn to before me this 7th day of February, 1947.

/s/ WILLIAM J. MADDEN,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 3, 1947. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney, acting under the direction of the Attorney General of the United States and at the request of the Navy Department of the United States and for answer to the complaint herein admits, denies and alleges as follows:

I.

Defendant denies each and every allegation of

paragraphs I, II, III, IV, V, VI and VII, and specifically denies that the plaintiffs have been damaged in the sum of \$46,000.00 or any other sum whatsoever.

Wherefore, having fully answered the complaint herein, the defendant prays that this action be dismissed and that it recovers its costs and disbursements herein to be taxed.

J. CHARLES DENNIS,

United States Attorney.

FRANK PELLEGRINI,

Asst. United States Attorney.

Attorneys for Defendant.

Copy Received 7/21/47.

RYAN, ASKREN &

MATHEWSON,

Atty's for Plaintiff.

[Endorsed]: Filed August 11, 1947. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant and moves the Court for an order to dismiss the above entitled cause on the ground and for the reason that the Court does not have jurisdiction of the said cause pursuant to the provisions of Sections 931 and 943, Title 28, U.S.C., (Tort Claims Act).

This motion is based upon the files and records herein and upon the affidavits of Carl H. Wehr,

Lieutenant, United States Navy; William F. Lally, Commander, U.S.M.R.; and Samuel J. Reiffel, Commander, U.S.M.R., wherein in said affidavits it is shown that the vessels of the United States Navy anchored in Port Discovery Bay for the periods described in the complaint on file herein were engaged in combatant activities during time of war and the Court therefore does not have jurisdiction of the cause of action asserted in the complaint on file herein for damages, if any, arising out of the anchorage of said vessels in said bay.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Ass't United States Attorney.

Copy received 4/14/48.

RYAN, ASKREN &
MATHEWSON,
Atty's for Plaintiffs—E H.

[Title of District Court and Cause.]

AFFIDAVIT OF LIEUTENANT CARL H.
WEHR, U. S. NAVY

District of Columbia—ss.

I, Carl H. Wehr, being first duly sworn, depose and say:

That I am a Lieutenant in the United States Navy, and at present am stationed with the Bureau

of Ordnance, Navy Department, Washington, D. C., in connection with Ordnance Logistics; that from January 30, 1945 until the middle of March, 1946, I was assigned to the staff of the Commander, Western Sea Frontier, Logistics Division, Ordnance Control Branch, and that the specific duty to which I was assigned was Assistant Officer-in-Charge of Ordnance Control. In general, all matters affecting ordnance logistics in the Central Pacific theater were well-known to me during this period, either by reason of orders and reports originating in my office or because of orders concerning ordnance logistic matters which came to my official notice.

That in the month of September 1944, due to the increase in the tempo of the war in the Pacific, and its being carried to the mainland of Japan, it became apparent that additional facilities for supplying ammunition to combat ships would be necessary. This matter was the subject of numerous dispatches between the Chief of [7] Naval Operations and the Commander-in-Chief of the Pacific and Pacific Ocean Areas. As a result of this need for increased ammunition supply facilities, a circular letter was issued by the Chief of Naval Operations dated 5 October 1944, a true copy of which is attached hereto and, for identification, marked "Exhibit (A)." Pursuant to the terms of this letter, ten ships then in the process of completion at Richmond, California shipyards were made available by United States Maritime Commission to the United States Navy, for commissioning as naval vessels and for use as ammunition supply ships. These addi-

tional vessels, as indicated in Exhibit (a), were urgently required for the transportation of ammunition to forward areas in the Pacific theater. Delivery "as is" was to be accepted. Because of the urgent need for the vessels, no conversion was authorized. Ordinarily, an ammunition ship of the United States Navy would be fitted with special racks and other types of stowage facilities for bombs, shells, and other types of ammunition, but in all ten ships mentioned in Exhibit (A), only the essential armament was added before shakedown and loading. These ten ships were allocated to the Commander-in-Chief, Pacific and Pacific Ocean Areas, to augment the then presently available ammunition ships assigned to the service of supply of various task forces and fleets engaged in combat operations.

As it became necessary for combat ships to rearm, they would proceed to the ammunition ships for this purpose. As a rule, such ammunition ships would rendezvous at a point less than one day's sailing time from the actual combat front. However, when occasion required, ammunition ships would be ordered to and did [8] rearm combat ships within a combat area or in enemy waters and, in such instances, it was not uncommon for ammunition ships to be within the range of enemy aircraft. As a result of this method of the supply of ammunition, as well as fuel, food, and other items, a task force was enabled to stay at sea and continue combat operations in enemy waters for as long as 60 to 70 days.

There are two principal methods of loading am-

munition ships in the United States Navy. The first of these methods is called "Fleet Issue" loading. This is a method of selective loading so that any combat ship of the United States Navy can procure any type and quantity of ammunition which she requires from the "Fleet Issue" ammunition ship without disturbing the remaining cargo. A ship loaded in this manner has been described as a "floating magazine." The other general type of loading is termed "block" loading. This is the method of loading used to transport large quantities of ammunition overseas for unloading at a land base, and for re-issue from such point. The sixteen ships later anchored in Port Discovery Bay, and to which reference is hereinafter made, were loaded in such a manner that they could rearm combat ships directly at sea, with a minimum loss of time under combat conditions.

At the cessation of actual hostilities in the Pacific, it was necessary to dispose of large amounts of ammunition then aboard ammunition ships in the area. All ammunition ship loadings were terminated. The Navy Department, acting through the Bureau of Ordnance, immediately commenced arrangements for the return and disposal of excess ammunition. There were at that time approximately 55 ammunition ships located in the forward area loaded with ammunition for the fleet and advance bases. About one-half of these vessels were operated by the War Shipping Administration. Due to the urgent need for the redelivery of these ships to private [9] operators, the first consideration was

the return of these vessels to continental ports, in order that crews could be discharged and the ships returned to their owners. In many cases merchant seaman's contracts had expired on board, and the inability to retain the crews aboard vessels in such cases after their return, precluded the retention of these ships at an explosive area, as a result of which a hazardous condition would be created in the harbor where such vessels would be anchored. At that time, that is, at the end of actual hostilities, the ammunition cargo aboard ammunition ships remaining after a portion of the cargo had been discharged, was consolidated in order to return fully loaded ships to the West Coast of the United States. Comparatively limited facilities capable of handling hazardous cargo existed in order to accommodate such a large number of vessels. For the reasons indicated above, the privately owned War Shipping Administration vessels were assigned first priority at ammunition terminals. During the last quarter of 1945 and the first quarter of 1946, the facilities at the Naval Magazines, Port Chicago, California, and Bangor, Washington, were operated to capacity. These two facilities, plus small tonnages discharged at an explosive anchorage in San Francisco Bay, accommodated about 80% of the ammunition ships. In order to prevent the further hazarding of already congested port areas, sixteen of the government-owned ammunition ships were placed in an ammunition "bank" in Port Discovery Bay, Washington, until discharging facilities became available. Eight of these ammunition ships so

anchored in Port Discovery Bay, Washington, are vessels referred to in the above-mentioned letter of the Chief of Naval Operations, Exhibit (A). [10]

These ships are as follows:

Provo Victory (AK-228)
Las Vegas Victory (AK-229)
Manderson Victory (AK-230)
Bedford Victory (AK-231)
Mayfield Victory (AK-232)
Newcastle Victory (AK-233)
Bucyrus Victory (AK-234)
Red Oak Victory (AK-235)

The eight remaining ships are as follows:

Alamosa (AK-156)
Antigone (AGP-16)
Lassen (AE-3)
Mazama (AE-9)
Pyro (AE-1)
Shasta (AE-6)
Mt. Baker (AE-4)
Autauga (AK-160)

As indicated above, these sixteen vessels were an essential component of the combat fleet in the conduct of the war against the Japanese government, and were directly connected with the successful operations of the Pacific Fleet of the United States Navy. All of these sixteen ships were fully commissioned vessels of the United States Navy at the time of their operations in the Western Pacific, and they so continued to be while anchored in Port Discovery Bay upon returning from the Pacific.

They had all been engaged in logistic support of combat operations. While they remained in Port Discovery Bay, they continued to be in the same physical condition, fully able to perform the same type of mission, as when engaged in operations in the Pacific. During the time of their retention in the ammunition ship "bank," and until such time as they were unloaded, they were in all respects in a full condition of readiness as a "floating magazine" of the United States Navy.

Dated at Washington, D. C., this 15th day of August, 1947.

CARL H. WEHR.

District of Columbia—ss.

Before me, a Notary Public in and for the District of Columbia, personally appeared Carl H. Wehr this 15th day of August, 1947, and, being first duly cautioned and sworn, acknowledged that he executed the foregoing affidavit, and that the facts contained therein are true to the best of his knowledge and belief.

[Seal]

HERBERT A. ENGLER,

Notary Public.

My Commission expires January 1, 1951. [11]

EXHIBIT "A"

Navy Department
Office of the Chief of Naval Operations
Washington 25, D. C.

Op 39A-mgc	101044
Serial 0105739	
(SC)QS1/L4	40001

5 October, 1944

Airmail

From: Chief of Naval Operations

To: All Bureaus, Boards and Offices, Navy Department Commandant, Twelfth Naval District

Subj: Acquisition of ten (10) VC2-S-AP2 design Victory cargo ships for AK 227-236.

Refs:

(a) Aux. Ves. Bd. Report No. 96.

(b) CinCPOA sec dis 230739 (Sep) to CNO.

(c) CNO conf ser 0102939 of 27 Sep '44 to MC.

(d) CNO conf dis 302150 (Sep) to Com-Twelve.

1. In accordance with ref (b) and as requested by ref (c), the Maritime Commission has designated the S/S Bouler Victory (MCV 536) as the first of ten new Victory cargo ships to be made available to the Navy upon their completion and has tentatively indicated that nine other vessels, in addition to MCV 536, all building by Permanente Metals Corp. Shipbuilding Division (Permanente Shipyard # 1), Richmond, California, will also be assigned:

Name	MCV #	Est. Del.	Class No.
Boulder Victory	536	8 Oct.	AK 227
Provo Victory	537	16 Oct.	AK 228
Las Vegas Victory	538	24 Oct.	AK 229
Manderson Victory	539	30 Oct.	AK 230
Bedford Victory	540	6 Nov.	AK 231
Mayfield Victory	541	12 Nov.	AK 232
Newcastle Victory	542	18 Nov.	AK 233
Bucyrus Victory	543	24 Nov.	AK 234
Red Oak Victory	544	30 Nov.	AK 235
Lakewood Victory	545	6 Dec.	AK 236

2. These ten vessels are urgently required for the transportation of ammunition to forward areas in the Pacific. Delivery of these vessels "as is" is therefore acceptable provided they are complete in all respects, both hull and machinery including all available spare parts and equipment applicable to the vessels. Spares should be in accordance with A.B.S. minimum requirements.

3. In addition to MCV 536 covered by ref (d), the Commandant is also authorized when their assignment to the Navy is approved by the Commission, to accept delivery of MCV537-345 incl., on a loan basis.

Classification of this correspondence changed to Unclassified.

Authority CNO serial 9034P32

Date 19 June 1947

W. H. NUTT. [12]

4. Due to the urgent need for subject vessels and in view of CinCPOA's recommendations, no conversion is authorized. However, BuShips is requested to provide for appropriate outfitting. Armament: 1-3"/50DP, 1-5"/38DP and 8-20 mm guns.

5. BuPers is requested to furnish the necessary naval crews to man these vessels including ship experienced winch operators and cargo handlers. Crew is limited by existing berthing and messing facilities and no attempt should be made to conform to a prescribed complement for similar size auxiliaries. In view of the Commission's desire and to identify these vessels, the Bureau is requested to recommend retention of the names already assigned by the Maritime Commission.

6. Upon receipt of sufficient personnel, ComTwelve is directed to place subject vessels in full commission classified as Cargo Ships (AK) and numbered AK 227-236, respectively.

7. Upon completion of outfitting, the Commandant is requested to direct AK 227-236 to report by dispatch to CominCH, CinCPac and COTCPac for duty making CNO, ComServPac and SubComServPac information addressees. Instructions for loading AK 227 have been issued SubComServPac by CinCPac.

8. Ultimate assignment of AK 227-236 is to Service Force, Pacific Fleet.

9. Report time and date vessels are accepted and commissioned by plain language deferred dispatches to CNO.

F. C. HORNE,

Vice Chief of Naval Operations

W. W. SMITH,

By direction

Authenticated:

/s/ W. N. MANSFIELD,

Commander, USNR

Copies to:

CominCH	ComFwdAreaCenPac
CinCPOA	Co CenComDet West Coast
CinCPac	CO PreComTraCen San Fran
ComServPac	Comdt NY MI
SubComServPac	AstIndMan San Fran
COTCPac	CO ArmGdCen San Fran
ComSeron 10	BuShips Lias Offer (San Fran)
ComPhibPac	PD San Fran
Com3rdFlt	NSD Oakland
Com5thFlt	Mar Comm (10)
ComELEVEN	Reg Dir Constr MC—West Coast
ComFOURTEEN	Reg Dir Constr MC—West Coast

In the Matter of

THE ALLEGED POLLUTION OF CLAM
FARMS AT PORT DISCOVERY BAY BY
USS BUCYRUS VICTORY ET AL.

State of New York,
County of Kings—ss.

William F. Lally being duly sworn deposes and
says:

I am a commander in the United States Naval Reserve, and was commanding officer of the USS Las Vegas Victory (AK229) from her commissioning on 25 October 1944 until she was decommissioned on 8 April 1946.

The USS Las Vegas Victory was an ammunition ship. She was loaded at the ammunition depot at Beaver, Oregon, and departed on or about 26 November 1944 for combat areas in the western Pacific. She was attached to Commander Service Squadron Ten at Ulithi, engaged in re-arming various combat ships.

The ship was engaged in the operations against Okinawa Gunto, and re-armed combatant units at Kerama Rnetto. She was also engaged in re-arming operations at sea.

On 15 August 1945 (V.J. Day) the ship was at Eniwetok, engaged in consolidating ammunition cargo with other ships preparatory to the planned attack against the Japanese mainland.

The ship left Eniwetok on 7 November 1945 under orders from Commander Service Force Pacific Fleet for Seattle. Shortly after leaving Eniwetok, there developed a serious leak in the stern tube gland. I thought it might be necessary to put into Midway or Pearl Harbor for repairs, but my Chief Engineer assured me that there was no danger, and I decided to continue on to Seattle.

We received a despatch en route from Commander Western Sea Frontier to pick up a pilot at Port Angeles and proceed to an anchorage in Port Discovery Bay. We picked up a pilot at Port Angeles (a Lieutenant Commander in the Coast Guard). He had an anchorage chart of Port Discovery Bay, and said he had instructions to anchor us in Berth Easy. We anchored in Port Discovery Bay on the morning of 19 November 1945.

My recollection is that the ship had about 3500 tons of ammunition aboard. During our stay at Port Discovery Bay, I attended a conference with my ammunition cargo officer at the Naval Ammunition Depot at Bangor, Washington. At this conference [14] we submitted an inventory of our ammunition cargo, answered questions as to what was

original issue, what we had received from other ammunition ships, and what had been returned to us from combatant ships. The purpose of this conference was to determine whether the ship's cargo should be discharged at Bangor, Washington; Port Chicago, California; Earle, New Jersey; or some other point.

It was intimated at the conference that our ammunition was not suitable for discharge at Bangor, Washington. I then requested the Assistant Industrial Manager at Seattle to repack the leaky stern tube gland, as it was unsafe to make a voyage to any of the other ports where we would have to discharge our cargo. A repair ship and divers were sent down and the stern tube gland repacked. I believe the Red Oak Victory had a stern tube packed at Port Discovery Bay at or about the same time. My recollection is that this occurred in December 1945.

On 15 February 1946 pursuant to orders of Commander Western Sea Frontier dated 13 February 1946 we left Port Discovery Bay bound for San Francisco, and discharged our cargo of ammunition at Port Chicago between 27 February and 14 March 1946.

/s/ WILLIAM F. LALLY.

Subscribed and sworn to before me this 24th day of April, 1947.

[Seal] JESSE S. JACOBS,

Notary Public, State of New York. Residing in
Kings Co. No. 38, Reg. No. 49-J-8.

Commission expires March 30, 1948. [15]

No. 494

State of New York,
County of Kings—ss.

I, Francis J. Sinnott, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, Do Hereby Certify, That Jesse S. Jacobs, whose name is subscribed to the deposition, certificate of acknowledgment or proof of the annexed instrument, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his appointment and qualifications, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my

and affixed the seal of the said Court and County this 24th day of April, 1947.

[Seal]

FRANCIS J. SINNOTT,
Clerk. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF COMMANDER SAMUEL J.
REIFFEL, USNR

Territory of Hawaii,
City of Honolulu—ss.

Samuel J. Reiffel, being first duly sworn, deposes and says as follows:

I am a Commander in the United States Naval Reserve, and was Commanding Officer of the USS Pyro (AE-1) from the time she entered Port Discovery Bay, Washington, on 21 November, 1945. After Commander J. E. Wade was hospitalized on or about 29 November, 1945, I assumed the duties of Senior Officer Present Afloat.

Prior to proceeding to Port Discovery Bay, the USS Pyro was attached to the Seventh Fleet in the Western Pacific and was operated in the Admiralty Islands, in New Guinea, and in the Philippines. At these places the Pyro was engaged in combat operations consisting of issuing ammunition to ships in and around Leyte Gulf; San Jose, Mindora; Zamboango, Mindanao; and Subic Bay, Luzon. The mission of my ship in re-arming combatant ships in the combat area was an essential part of

war activity. Following these operations, my ship was ordered to Manus Island in the Admiralty Islands for necessary repairs, thence to Eniwetok in the Marshall Islands. At that point, orders were received to proceed to Seattle, but en route to Seattle, further orders were received to proceed and anchor in Port Discovery Bay. [17]

To the best of my knowledge and information, all other Navy ammunition ships present in Port Discovery Bay during the period from 21 November, 1945, until March, 1946, had returned from the Western Pacific, from duties of a similar character; that is, re-arming combat ships, both at sea and at anchor. Upon returning to this country, the first anchorage of the USS Pyro within the territorial limits of the United States was at Port Discovery Bay with the sole exception of a brief medical inspection for tropical diseases and other matters. No ammunition was unloaded by the USS Pyro subsequent to the active combat fleet operations above mentioned until after this ship left Port Discovery Bay, on 15 February, 1946.

The purpose of ordering these Naval vessels from the Pacific to Port Discovery Bay and the presence of the ships in Port Discovery Bay was in connection with combatant activities. These Naval vessels were held in Port Discovery Bay pending a decision concerning where to dispose of the cargoes of ammunition carried aboard each Naval vessel. To the best of my knowledge, after the decision regarding the disposal of the ammunition which had been stored aboard the vessels for use in

combatant activities was reached, all Naval vessels left Port Discovery Bay and went to various places where the ammunition was unloaded and placed in storage or otherwise disposed of.

During the period of time the ship was in Port Discovery Bay, the personnel aboard were for the most part the same as those aboard while in the Pacific area, with the exception of the men who were released to inactive duty. The armament and equipment of the ship had not been changed since leaving the combat areas of the Western Pacific.

The USS Pyro was commissioned in the United States Navy on 1 July, 1939, and was decommissioned on 12 June, 1946.

As the Senior Officer Present Afloat, it was my responsibility to pass on to all commanding officers of all United States Naval ships in Port Discovery Bay the orders of the Thirteenth Naval District. A copy of Thirteenth Naval District order dated 15 November, 1945, attached hereto and marked Exhibit "A," was received by me [18] according to the provisions of paragraph 5. These orders were the basic orders governing our anchorage, and, to the best of my knowledge, provisions of this order were observed by all commands during the period my ship was present at Port Discovery Bay.

According to the best information available to me at this time, the following were the ships anchored in Port Discovery Bay during the period in which I was acting as Senior Officer Present Afloat:

Alamosa, AK-156; Bedford Victory, AK-231; Bu-

cyrus Victory, AK-234; Lassen, AE-3; Las Vegas Victory, AK-229; Manderson Victory, AK-230; Mayfield Victory, AK-232; Mazama, AE-9; New Castle Victory, AK-233; Provo Victory, AK-228; Pyro, AE-1; Red Oak Victory, AK-235; Shasta, AE-6.

After my ship departed from Port Discovery Bay on 15 February, 1946, the Senior Officer Present Afloat was Commander Henry R. Shufeldt, the Commanding Officer of the USS Lassen (AE-3).

/s/ SAMUEL J. RIEFFEL.

Territory of Hawaii,
City and County of Honolulu—ss.

Before me, a Notary Public in and for the City of Honolulu, Territory of Hawaii, personally appeared Samuel J. Reiffel this 13th day of June, 1945, and, being first duly cautioned and sworn, acknowledged that he executed the foregoing affidavit, and that the facts contained therein are true to the best of his knowledge and belief.

[Seal] /s/ CLAYTON A. HOFFMAN,
Notary Public.

My commission expires April 24, 1950. [19]

Territory of Hawaii,
City and County of Honolulu—ss.

I, Maydeen I. Fuller, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, the same being a Court of Record and having a seal, do hereby certify that Clayton A. Hoffman before whom the foregoing acknowledgment was taken,

was at the time of taking the same, a Notary Public duly commissioned and sworn for the First Judicial Circuit of the Territory of Hawaii and duly authorized by the laws of said Territory to take and certify acknowledgments or proofs of deeds of land, etc., in said Territory in the manner aforesaid; that I am well acquainted with the handwriting of said Clayton A. Hoffman and verily believe that the signature to said certificate of acknowledgment is genuine. And further, that said acknowledgment was taken in accordance with the laws of the Territory of Hawaii; that I have compared the impression of the seal affixed thereto with a specimen impression thereof deposited in my office and that I believe the impression of the seal upon the original certificate is genuine.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court at Honolulu aforesaid this 13th day of June, 1947.

[Seal] MAYDEEN I. FULLER,
Clerk, Circuit Court, First Judicial Circuit, Territory of Hawaii. [20]

Copy

EXHIBIT "A"

15 November 1945

From: Commandant, Thirteenth Naval District
Officer-in-Charge of Ammunition Ships Awaiting Discharge in Thirteenth Naval District.

Subject: Officer-in-Charge of Ammunition Ships
Awaiting Discharge in Thirteenth Naval District, Instructions.

1. You are directed to take command of the anchorage areas provided for vessels Navy or Navy operated returning from forward areas loaded with ammunition, awaiting opportunity to discharge their cargoes of explosives. You are charged with the execution of safety precautions pertaining to the safe guarding of the ammunition ships while they are within the limits of the anchorage.

2. There have been established two (2) anchorages designated for the purpose of anchoring vessels with returned ammunition; one at Discovery Bay off the Straits of San Juan De Fuca, and one at Holmes Harbor, Whidby Island off Saratoga Passage. Discovery Bay will be the area used first. In these areas, anchorages have been indicated consecutively numbered, each anchorage having a diameter of 600 yards or 2000 yards, as shown by the charts attached hereto. Vessels loaded with ammunition subject to enmasse detonation, such as classes VII, IX, X, and XI Naveg-108 Revised regulations, must be anchored singly at least 2000 yards apart, if ammunition cargo exceeds 3000 tons. Ships loaded with ground force ammunition or having ammunition cargoes less than 3000 tons may be berthed 1200 yards apart.

3. The purpose of your orders is to safeguard the vessels laden with explosives during the period which may be required to maintain them in this district before they may be assigned to an [21] unloading pier or diverted to other naval districts. To accomplish these duties you will be furnished with men and equipment from the Small Boat Pool of 13th Naval District and from the U. S. Coast Guard

13th Naval District. The specific duties of these detachments will be indicated herein.

4. You will be informed by the Port Director, 13th Naval District, of the expected arrival of any vessel for berthing in the anchorage area.

5. Before entering either anchorage area, the Commanding Officer of each U. S. Naval vessel or master of each commercial vessel will be given copies of these orders of the Commandant specifying the general safety duties which must be performed by such commanding officer or master, and will be directed to report to the Officer-in-Charge and to comply with these instructions.

6. The U. S. Coast Guard will maintain picket boats, one for each explosive area, manned at all times, for the purpose of carrying out the following specific duties:

- a. Upon the approach of an explosive laden vessel, the Coast Guard picket boat will convoy such vessel to its anchorage, assigned by the Officer-in-Charge. The Coast Guard unit on the picket boat will be responsible for the exact location of each vessel within its assigned anchorage.
- b. The picket boat will have the additional duty of warning all vessels of 100 tons or over, gross register, as they approach the harbors, of the danger of entering the explosive area.
- c. The picket boat will be at the command of the Officer-in-Charge and will be used for emergencies and for the purpose of inspections as later detailed. [22]

7. There will be assigned from the Small Boat Pool of the 13th Naval District, craft and personnel for each explosive anchorage whose duties under the Officer-in-Charge will be:

- a. To man suitable fire boats or barges which will be supplied to them by the 13th Naval District, one boat to be located in each explosive anchorage area. The fire boats will be manned at all times by thoroughly experienced crews capable of operating the vessels under fire fighting conditions.
- b. To furnish such other small boats and personnel to man them as may be necessary to supplement the small boats available from vessels at anchor in order that delivery of supplies and landing of liberty parties be adequately accomplished.
- c. To maintain tugs, to be supplied by the 13th Naval District suitable for the purpose of assisting in moving promptly any of the fully laden vessels from within the limits of the anchorage to a point of safety beyond the area.

8. It is expected that there will be two (2) classes of vessels at anchor within the area which will be placed under the direction of the Officer-in-Charge of Ammunition Ships Awaiting Discharge and which will be directed to comply with the safety regulations required by the U. S. Coast

Guard, hereto attached and made a part of these orders:

a. The first class of vessels may be U. S. Auxiliary vessels fully manned whose commanding officers will be ordered to render such assistance and use of personnel as the Officer-in-Charge may consider necessary for the efficient maintenance of safety precautions directed to be carried out by these general instructions.

b. The second category of vessels to be anchored may be merchant [23] vessels so manned that they are capable of getting under way prompt in the event of emergency. Those vessels will be practically fully manned and the master of each will be directed to furnish such men and material which the Officer-in-Charge may require for the carrying out of these general safety provisions.

9. All vessels within the anchorage shall make distress or emergency signals by the continuous rapid ringing of the ship's bell and in addition in the daytime by the display of the international Ship's flag distress signal and at night by the Very pistol signals. Fog signals on all vessels shall be sounded in accordance with pilot rules.

10. The Officer-in-Charge shall cause an inspection to be made in each eight (8) hour period of the day of every ship within the anchorage, of the fol-

lowing particulars and their compliance with the special safety precautions:

- a. The alertness of the anchor watch on each vessel.
- b. Each vessel's anchor gear in relation to its readiness to be let go in case of emergency and the possibility of the anchor dragging in weather.
- c. A towing hawser on all vessels within the anchorage laid out for immediate use with one end secured and the eye-end laid overboard for use by tugs for towing.
- d. Accomodation ladders rigged on all vessels at all times and on the opposite side each vessel a Jacob's ladder swung over the side to the water's edge.

11. Smoking shall be allowed on vessels in anchorage only in areas designated by the Officer-in-Charge. [24]

12. No liquor nor drugs shall be permitted aboard vessels within the anchorage other than such within the custody of organized departments.

13. No visitors shall be allowed aboard vessels in anchorage.

14. The provisions of the Oil Pollution Act shall be rigidly followed.

15. The Officer-in-Charge shall take such other precautions which he considers proper for the safety of the vessels within the anchorage.

16. The responsibility of the Officer-in-Charge shall cease in regard to individual vessels when each have been removed from the specified limits of the anchorages.

RANDALL JACOBS,
Rear Admiral, USN,
Commandant, 13th ND.
E. P. ABERNETHY,
By direction.

Copy to:

DCGO, 13th ND

All ships involved

Boat Pool Officer, 13 ND

[Endorsed]: Filed April 14, 1948. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1746

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE dba JOHNSON & GUNSTONE,
a Co-Partnership,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington

April 26, 1948, 10:00 o'clock a.m.

COURT'S DECISION ON MOTION TO DISMISS

The Court: The fact that a battle was not being waged on the day or days when this damage was caused seems to the Court to be not determinative of this issue as to whether or not these vessels were being employed in combatant service at the time. If there was a prospect of need of these vessels either in a battle not yet ended or in one that might soon be started, it would seem to me that such status meets the condition of exemption stated in the statute exempting as it does liabilities arising through the conduct of war combat activities; that is the effect, I believe, of the exemption.

The Court feels that in this instance, as in all others, it is the duty of the Court to require a showing [26] of jurisdiction by the party suing,—in this instance that the cause of action is one as to which the United States government has consented to be sued. That is not clearly shown here.

On the other hand, the Court is convinced on the facts disclosed in particularly the affidavit of Samuel J. Reiffel that these vessels causing the alleged damage were while causing it engaged in combatant service and activities reasonably connected with the Japanese war which was not then officially ended.

One reason the Court is of that opinion is that it is well known that not only is the first line of de-

fense in a particular battle a combatant activity but also the necessary supporting services are just as much so in their nature. Were it not for the supporting services, such as supply ships and ammunition carriers, the battle could not last long. And as long as there is any necessity for obtaining an unbroken line of ammunition supply to the war combatant vessels and a ship such as those ships named here is engaged in supplying that ammunition, the Court has no alternative other than to find that such activity of the supplying vessel, although held at anchorage some distance from the point at which the ammunition may be fired at the enemy, is engaged in combatant service within the statutory exemption of combatant activities respecting which the government has not consented to be sued.

The motion to dismiss should be and is granted. The action of the defendant, pursuant to the ruling of the Court on the motion to produce, may be suspended pending the entry of a proper order on this motion to dismiss, [27] at which time the Court may have more to say on what further should be done, if anything, by the defendant pursuant to the Court's announced ruling on the motion to produce.

Mr. Madden: Just one thing, if Your Honor please. Your Honor said there was no showing by the plaintiff. I assume this is one of those things where the facts are obvious and it is more or less of Your Honor's interpreting.

The Court: Did I use the word "no showing"? I meant "no sufficient showing." Such showing as was made by the plaintiff was insufficient to con-

vince the Court that there was jurisdiction in the Court to maintain this action.

Does that meet your inquiry? If it does not, I will try to expand it more, Mr. Madden.

Mr. Madden: No. I mean there was no dispute as to the facts in regard to where the ships were.

The Court: And by those facts, so much of them as are set forth by the plaintiff, the Court is not convinced that the action is one which is cognizable under the Tort Claims Act, for the reasons which the Court has discussed.

Concluded.

[Endorsed]: Filed April 28, 1948. [28]

[Title of District and Cause.]

ORDER OF DISMISSAL

This matter coming on for hearing on defendant's motion to dismiss the action herein, the plaintiff being represented by Ryan, Askren & Mathewson and William J. Madden, the defendant being represented by J. Charles Dennis, United States Attorney, and Frank Pellegrini, Assistant United States Attorney, and the Court having heard the arguments and having considered the said motion and the uncontradicted affidavits submitted in support thereof, and it appearing to the Court from the pleadings and the said motion that the United States of America was engaged in war at the times of the occurrence of the events alleged in the complaint on

file herein and that the said claim sued on arises out of the combatant activities of the United States Navy and that the Court does not have jurisdiction of the subject matter of the action herein, and the Court being fully advised in the premises, now, therefore, it is

Ordered and Adjudged that the defendant's motion to dismiss be and it is hereby granted and the action be and it is hereby dismissed.

Done in open court this 3rd day of May, 1948.

JOHN C. BOWEN,
United States District Judge.

Presented by:

FRANK PELLEGRINI,
Assistant United States At-
torney.

Approved as to form.

WILLIAM J. MADDEN,
Attorney for Plaintiff.

[Endorsed]: Filed May 3, 1948. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73B

Notice is hereby given that Andrew L. Johnson and Charles W. Gunstone, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from the Order of Dismissal entered in the above court on the 3rd day of May, 1948.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,

Attorneys for Appellants: Andrew L. Johnson
and Charles W. Gunstone, 545 Henry Building,
Seattle 1, Washington.

[Endorsed]: Filed May 11, 1948. [30]

[Title of District and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD OF APPEAL

To the clerk of the United States District Court:

Comes now the appellants by their attorneys,
Ryan, Askren & Mathewson and William J. Mad-
den, and designate the following pleadings which
they wish prepared for transmission to the Circuit
Court of Appeals in connection with the appeal
heretofore filed in this cause:

1. Plaintiff's original Complaint.
2. Defendant's Answer.
3. Defendant's Motion To Dismiss.
4. Affidavits of Carl H. Wehr, William F. Lally
Samuel J. Reiffel.
5. Court's Memorandum Opinion on the Motion
To Dismiss.

6. Order of Dismissal.

7. Notice of Appeal.

Respectfully submitted,

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,
Attorneys for Appellants.

Copy Received May 17, 1948.

FRANK PELLEGRINI,
By P. CALLAGHAN.

[Endorsed]: Filed May 17, 1948. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages 1 to 31 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at

Seattle and that the same constitute the record on appeal from the Court's decision dismissing the cause of action, said decision being dated April 26, 1948.

I further certify that the following is a true and correct statement of all expenses, cost, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

5 pages at 10c (copies furnished).....	\$.50
25 pages at 40c.....	10.00
Notice of Appeal.....	5.00

Total\$15.50

I further certify that the foregoing amount of \$15.50 has been paid to me by the attorneys for the appellants. [32]

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 28 day of May, 1948.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

General Casualty Company of America
Seattle, Washington

BOND FOR COSTS ON APPEAL

Know all men by these presents:

That we, Andrew L. Johnson and Charles W. Gunstone doing business as Johnson & Gunstone, a Co-Partnership, the Plaintiff above named as Principals, and the General Casualty Company of America, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the United States of America, the Defendant above named, in the just and full sum of Two Hundred and Fifty and No/100.....\$250.00) dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of April, A.D. 1948.

The condition of this Obligation is such, That,

Whereas, the above named Defendant on the 26th day of April, A.D. 1948, in the above entitled action and court, recovered judgment against the Plaintiffs above named for Demurrer,

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment from said

United States District Court to United States Circuit Court of Appeals.

Now, Therefore, if the said Principals, Andrew L. Johnson and Charles W. Gunstone doing business as Johnson & Gunstone, a Co-Partnership, shall pay to the United States of America, the Defendant above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100.....Dollars, then this obligation to be void; otherwise to remain in full force and effect.

ANDREW L. JOHNSON,
CHARLES W. GUNSTONE,
GENERAL CASUALTY

COMPANY OF AMERICA,

By /s/ CLAUDE W. HOUGHTON,
Attorney-in-fact.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

MILLARD P. THOMAS,
Clerk U. S. District Court,
Western District of Washington.
By WALLACE W. PETERSON,
Deputy Clerk.

[Endorsed]: Filed DC June 10, 1948.

[Endorsed]: Filed CCA June 12, 1948.

[Endorsed]: No. 11948. United States Circuit Court of Appeals for the Ninth Circuit. Andrew L. Johnson and Charles W. Gunstone, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 1, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11948

ANDREW L. JOHNSON and CHARLES W.
GUNSTONE, d/b/a JOHNSON & GUN-
STONE, a Co-Partnership,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

1. That the United States District Court had jurisdiction of the case and subject matter by virtue of the Federal Tort Claims Act, Title IV of the

Legislative Reorganization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778.

2. That the vessels causing the alleged pollution were not engaged in combatant activities so as to fall under one of the exemptions of the so-called Federal Tort Claims Act.

3. That the United States was not during the month of December, 1945 or during the year 1946 engaged in active hostilities, and that its naval vessels were during those periods engaged in combatant activities so as to cause their activities to be exempted from the provisions of the Federal Tort Claims Act under the provision thereof exempting from the Act any claim arising out of the combatant activities of the military or naval forces or the Coast Guard during time of war.

4. That the claim set forth in the Appellants' complaint is one properly brought in the District Court of the United States under the provisions of the so-called Federal Tort Claims Act.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,

Attorneys for Appellants.

[Endorsed]: Filed June 11, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants herewith designate the whole record heretofore filed in this Court in this cause as necessary for the consideration of their Statement of Points.

WILLIAM J. MADDEN,
RYAN, ASKREN &
MATHEWSON,
Attorneys for Appellants.

Copy served on United States Attorneys for Appellee June 10, 1948.

WILLIAM J. MADDEN,
Of Counsel for Appellants.

[Endorsed]: Filed June 11, 1948.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW L. JOHNSON and CHARLES W. GUNSTONE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

RYAN, ASKREN & MATHEWSON,
WILLIAM J. MADDEN,
Attorneys for Appellants.

Address:

545 Henry Building,
Seattle 1, Washington.

FILED

JUL 16 1948

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW L. JOHNSON and CHARLES W. GUNSTONE,
Appellants,

vs.

UNITED STATES OF AMERICA,
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APPELLANTS' BRIEF

RYAN, ASKREN & MATHEWSON,
WILLIAM J. MADDEN,
Attorneys for Appellants.

Address:

545 Henry Building,
Seattle 1, Washington.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

<hr/> ANDREW L. JOHNSON and CHARLES W. GUNSTONE,	<i>Appellants,</i>	}	No. 11948
vs.			
UNITED STATES OF AMERICA,			
	<i>Appellee.</i>		

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

I.

STATEMENT OF THE CASE

1. The Parties

This action was brought in the court below by Andrew L. Johnson and Charles W. Gunstone, a co-partnership, doing business under the name of Johnson & Gunstone, against the United States of America. The co-partnership will be referred to as the plaintiff or appellant and the United States of America as the defendant or appellee.

The action was brought under the provisions of Title IV. of Legislative Reorganization Act of 1946, Public Laws 601, 6 U.S.C. Congressional Service 778.

2. Statement of Facts and Issues of Case

The plaintiffs herein are owners of certain tidelands and tide flats located at Discovery Bay in the State of Washington which they have developed as a commercial clam farm. For many years prior to the bringing of this action, the plaintiffs had harvested and marketed the clams taken from said tide lands. On or about the first of December, 1945, the United States Navy anchored a number of large naval vessels in the waters of Discovery Bay adjacent to the tide lands of the plaintiffs and there was discharged into the Bay from the boats there moored, sewage, oil and other noxious matters which polluted the water and adjacent shore lands owned by the plaintiffs. Thereafter and as a result thereof, the State of Washington, on the 10th of December, 1945, issued an order prohibiting the taking of clams from the plaintiffs' lands for sale to the public, which order continued in force until after the termination of the normal clam digging season. As a result of the said pollution the plaintiffs sustained a loss as set forth in the complaint of approximately \$46,000.00.

The plaintiffs brought the action in the court below under the provisions of Title IV. of the Legislative Reorganization Act of 1946, Public Law 601, 6 U.S.C. Congressional Service 778, said section being popularly known as Federal Tort Claims Act.

The defendant filed, among other pleadings, affidavits of the commanding officers of three of the ships which were moored in Discovery Bay during the period in question, the substance of which affidavits was

that due to the congestion in other ports at the cessation of hostilities, certain vessels were moored in Discovery Bay, where they remained awaiting the time they would be put into service transporting munitions back to this country from former combat areas (R. 7-31). The foregoing depositions were filed in support of the defendant's motion to dismiss this action for the reason and on the grounds that it was improperly brought, falling into one of the exceptions to the Act (R. 6). It was contended by the defendant that the court was without jurisdiction as being excluded by Section 421-J which reads as follows:

"The provisions of this Act shall not apply to

* * * * *

"J.—Any claim arising out of the combatant activities of the military or naval forces or Coast Guard during time of war."

The motion to dismiss was brought on before Honorable John A. Bowen, Judge of the District Court, and he held that this case fell within the exception quoted and dismissed the action (R. 32-35). From his dismissal the plaintiffs appeal to the Circuit Court.

II.

SPECIFICATION OF ERRORS

The court below was in error in granting the defendant's motion to dismiss the action.

III.

POINTS TO BE RELIED UPON

The two points upon which appellants will rely in attempting to show that this action was one properly brought before the Federal Court under the terms of the Federal Tort Claims Act, are:

(1) That the vessels causing the alleged pollution were not engaged in combatant activities so as to fall under one of the exemptions of the Federal Tort Claims Act.

(2) That the United States was not during the month of December, 1945, or during the year 1946, engaged in active hostilities and that the activity of its naval vessels in that period did not take place during time of war.

IV.

ARGUMENT

1. The Claim in Question Did Not Arise Out of the Combatant Activities of the Military or Naval Forces During Time of War.

Due to the fact that the so-called Federal Tort Claims Act is legislation of recent origin there are very few appellate court interpretations of its provisions. It is believed that this action is the first one which has come before the Circuit Court for a determination of the military and naval activities exemption in the statute.

It is suggested that a contemplation of the reason for the passage of the Act will throw illumination as to the intent of Congress in bringing it into being. Prior to the existence of this legislation it was necessary for a litigant to prevail upon his congressman to introduce a private bill for the redress of a wrong committed by agencies of the United States. With the expansion of the activities in which the Federal Government was interested, the volume of private bills with which Congress had to deal became so onerous

that the statute in question was passed so as to allow such claims to be handled by the courts. The intent of Congress in funneling suits of this character into Federal Courts was obviously to free itself so that the time previously consumed in their consideration could be devoted to the more natural objects of its attention.

There was exempted from the blanket operation of the Act certain specified types of litigation which for various reasons the Congress felt should be or were being cared for in another manner. Among the exceptions Congress excluded from the operation of the Act were claims arising out of the combatant activities of military or naval forces or Coast Guard during time of war.

It is a reasonable presumption that the Congress felt that damage caused during active warfare was of such unusual character that it should be judged and dealt with by a different standard than those actions of Government agencies which took place in circumstances more conducive to reasonable reflection. It is submitted, however, that it was the intent of Congress in passing this legislation to divest itself of as much of this type of litigation as possible.

If it were the intent of Congress to exclude from the operation of the Act any activity taking place during time of war, which was in any way connected with the belligerent activities, language could easily have been inserted in the statute which would have made that intention clear. It should be noted that Congress did not say that there should be exempted from

the operation of the Act any activity of the military forces during time of war or any activity connected with war, but they specifically declared that only those claims arising out of the *combatant* activities of the military forces during the time of war should be so excluded.

If the court were to exclude from the Act's operation everything, no matter how remote, which might be in any way connected with the operation of the armed forces, it is suggested that the obvious intent of Congress to relieve itself of these claims would be circumvented. Such an interpretation would not only be unrealistic but would eventually force the passage of clarifying legislation in order to accomplish the result they are obviously trying to reach by this law.

In the instant case we have a situation where the damage claimed was caused by the pollution of the water and adjacent tide lands of Discovery Bay in the State of Washington by United States naval vessels temporarily moored there. The situs of the action complained of was some three thousand miles distant from the most recent scene of any actual combat. This, aside from the fact that actual hostilities had ceased prior to the events set forth in the complaint. If damage caused in routine activity on ships moored three thousand miles from the scene of combat can be held to be the result of combat activities, then certainly damage caused by a United States motor vehicle on the streets of Seattle or New York City could equally be said to be the result of combatant activities, although such a conclusion is obviously untenable. To

carry the analogy still further, although in logical sequence, a wrong committed by an agent of the Government in a factory one thousand miles inland, which was fabricating some armaments eventually destined for a combat area could also be said to be excluded under such an interpretation. Such was not the intent of Congress when the combatant activities exemption was engrafted on this legislation.

The only case which counsel for the appellant have been able to find which passes upon this section of the Act is that of *Skeels v. United States*, 72 F. Supp. 372. In that case a fisherman was killed in the Gulf of Mexico by a metal object dropped from a United States Army plane which was there engaging in practice preparatory to being sent into the Pacific Theater of war. This accident happened while the United States was still actively engaged in hostilities with Japan. The same defense was asserted by the Government that was asserted in this case and the court held that although the agent of the Government causing the injury was actively practicing for combat duty, he was so far removed from the combat zone that it did not fall under this exemption, so as to be embraced by the language exempting injuries caused by combatant activities during time of war. The case has apparently not been appealed. It seems that an airplane engaged in simulated warfare, preparatory to actual combat comes more nearly falling into the category than does a naval ship dumping garbage into a bay, in which it is peacefully moored three thousand miles from the nearest scene of any combat.

2. The Activities of the Naval Vessels of the United States Which Are Complained of in the Plaintiffs' Complaint Did Not Take Place During Time of War.

Though it is felt the facts of this case indicate conclusively that the acts complained of did not arise out of combat, the argument that there was no war being waged at the time of the pollution of the plaintiffs' property is equally compelling.

It is undisputed that hostilities had ceased prior to December 1, 1945, the first date upon which the pollution alleged in the plaintiffs' complaint occurred. Japan surrendered on August 14, 1945, nearly four months prior thereto. The only basis upon which the judgment of dismissal of the lower court could be upheld would be by indulging in the legalism that war continued to exist for the purposes of interpretation of this legislation until a formal treaty of peace with all its ramifications had been worked out and executed. The formal termination of hostilities did not take place until the Presidential proclamation of December 12, 1946. It is repeated again that such an interpretation is not in conformity with the obvious intent of Congress in passing this act. Inasmuch as the government willingly waived its immunity to be sued, it would be illogical to hold that this waiver of immunity should be circuitously thwarted by such an unrealistic interpretation. When Congress made certain exceptions to the operation of this act, it was protecting the Treasury against the type of claim which could not be readily or properly investigated, or against the type which the government should have

the opportunity of deciding to what extent, if any, it should be paid. Such claims are those which arise either in the heat or in the environs of battle, but when a tort is committed by a governmental agency while the country is factually at peace, its character is not changed because the protocol of formal surrender has not yet been worked out. It was not the intent of Congress to exclude these claims from the courts on such a technicality.

To appellants' knowledge no decisions have yet come down interpreting the phrase "time of war" as used in this act. The courts have, however, decided when war terminated for purposes of resolving conflicts over pertinent clauses in contracts and other written instruments. In the case of *Samuels v. United Seamen's Service, Inc.*, 165 F.(2d) 409, the appellants appealed to the Circuit Court for relief from a lower court decision interpreting a clause in a lease whereby the tenure was to extend for six months after the cessation of hostilities. The court held that such language meant the cessation of actual warfare and not the formal signing of a peace proclamation. In the case of *Stinson v. New York Life Insurance Company*, U.S.C.A., D.C., decided March 15, 1948, the appellant sued as beneficiary in an action to collect on a life insurance policy. The policy restricted recovery if death occurred outside the home area while the insured is in the military or naval forces of any country engaged in war. The court held that for purposes of the policy the United States was not a country engaged in war on the date of the insured's death, even

though the war had not ended for public purposes by the signing of a treaty of peace or proclamation. The court held that in common usage the war ended with the surrender of Japan. The same result was reached by the Circuit Court in the case of *New York Life Insurance Company v. Durham*, decided in the Tenth Circuit on March 4, 1948, digested in 16 U.S. Law Week 2451.

There is a line of cases holding that terms such as "duration" and "end of war," etc., mean the cessation of actual hostilities, and that such words and phrases should be construed in the light of common understanding rather than in a technical sense. *United States v. Hicks*, 256 Fed. 707; *Kaiser v. Hopkins*, 6 Cal.(2d) 537, 58 P.(2d) 1278; *Scott v. Commissioner of Civil Service*, 272 Mass. 237, 172 N.E. 218; *La Fevre v. Healy*, 92 N.H. 162, 26 Atl.(2d) 681.

After the First World War the City of Seattle, Washington, passed a charter amendment giving preference in employment to those who had served "in time of war." An action was brought by an applicant for a civil service position who had served after hostilities had ceased but before a treaty of peace had been signed. In construing the phrase "time of war" the court used the following language:

"The sole question in the case is what is meant by the words 'have served in time of war' in the charter amendment as applied to the World War. Appellant contends these words mean in point of time down until the ratification of the treaty of peace, while respondents say they do not apply to service commenced after the signing of the armistice. In this respect words in a given setting

and for a particular purpose may mean and often must be considered to mean a different thing from what they do in some other setting. What did the people of Seattle mean by this language they used in amending their charter?

“The words must be read in a sense which harmonizes with the subject matter and the general purpose and object of the amendment, consistent of course with the language itself. The words must be understood not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment. They are to be understood in the common, popular way, and, in the absence of some strong and convincing reason to the contrary, not found here, they are not entitled to be considered in a technical sense inconsistent with their popular meaning.”

State ex rel. Peter v. Listman, 157 Wash.
229, 288 Pac. 913.

Though there has been decisions, particularly after the First World War, which held that for the purpose of interpreting certain statutes the war ended only at the time of a formal declaration of peace, these pronouncements are neither pertinent nor of assistance in the instant case. We are not here concerned with the type of interpretation which may prematurely cause the demise of a war agency needing more time to bring its affairs to an orderly termination. The peculiar necessity which caused the insertion of the phrase “during time of war” in this statute was one which required that litigants should not be allowed

to take into court their claims for damages caused by act of battle. As soon as the active rather than the legalistic state of war had terminated, the need for the excepting of claims arising therein ceases.

CONCLUSION

In order to exclude a claim under the provisions of Section J of this act, it is necessary to prove that the claim arose (1) out of combatant activities, (2) in time of war. If either of the above is lacking, the exception is no bar and the case may properly be brought under the provisions of the act. It is submitted that at the time the torts complained of took place there was no state of war existing involving our country, and that the pollution most certainly was not caused by combatant activities.

In view of the foregoing, the appellants pray that the Order of Dismissal of the trial court be reversed, and that the action should be remanded and allowed to go to trial on its merits.

Respectfully submitted,

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WILLIAM J. MADDEN,

Attorneys for Appellants.

PAUL P. O'BRIEN, 2
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BRIEF OF APPELLEE

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

I. STATEMENT OF THE CASE

Appellants, owners of tide lands developed as commercial clam beds located on Port Discovery Bay, Washington, bring this action to recover for alleged loss of profits because of the alleged pollution of the waters of the Bay and the entry of an order by the

State of Washington prohibiting the taking of clams from the beds for sale to the public for the period December 10, 1945 to March 31, 1946. The complaint (R. 2-5) alleges that the waters of the Bay were polluted by naval vessels anchored therein and as a result of this pollution the State's prohibitory order was issued and the loss sustained.

Jurisdiction of the cause is predicated on the Federal Tort Claims Act, hereinafter referred to as the "Act" (Sec. 931, et seq., Title 28, U.S.C.) (R. 2).

Appellee moved to dismiss the action on the ground the lower court did not have jurisdiction of the claim (R. 6) in that Section 421(j) of the Act (Sec. 943(j), Title 28, U.S.C.) specifically exempts claims "arising out of combatant activities of the military or naval forces or Coast Guard during time of war". In support of the motion to dismiss, appellee filed affidavits of three naval officers, Lt. Col. Wehr, U.S.N. (R. 7-16), Commander W. F. Lally, U.S.N.R. (R. 17-20) and Commander Samuel J. Reiffel, U.S.N.R. (R. 21-31). The facts alleged in the said affidavits were not contradicted by appellants. The affidavits may be summarized as follows:

From time to time during the period December 10, 1945 to March 31, 1946, sixteen Naval Ammunition Ships were anchored in Port Discovery Bay. The

vessels were regularly commissioned naval vessels manned by naval personnel (R. 14-16) and attached to and operated as components of the United States naval combat task forces in the Western Pacific. Their duty was to rearm naval combat vessels operating at sea in the forward combat areas and in enemy waters (R. 10, 17, 21). They were "floating magazines" so loaded that combat ships could procure any type or quantity of "live" ammunition required to rearm without disturbing the remaining cargo and with a minimum loss of time (R. 10). This method of loading referred to in the Navy as "fleet issue" enabled the said ammunition vessels to rearm combat vessels at sea or at anchorage and without the necessity of proceeding to port. Consequently, a naval task force was able to stay at sea and continue combat operations in enemy waters for long periods of time (R. 9). All of the said ammunition vessels were directly connected with the successful operations of the Pacific Fleet of the United States Navy in the Pacific (R. 12). On the cessation of the actual fighting in the Pacific, August 14, 1945, the Navy Department was faced with the problem of returning large quantities of unused ammunition to the United States (R. 10). A substantial portion of the ammunition had to be returned by Merchant vessels operated by the War Shipping Administration (R. 10). Discharging fa-

cilities for ammunition (ammunition depots) in the United States were limited and it was imperative in order to avoid extra hazardous conditions in the harbors that the merchant vessels immediately discharge their cargos on arrival (R. 10-11). Consequently the sixteen naval vessels were placed in an ammunition "bank" in Port Discovery Bay until discharging facilities became available (R. 11) and pending a decision concerning where to dispose of their cargos of ammunition (R. 22). While held in the "bank", the vessels continued to be in the same physical conditions, fully able to perform the same type of mission as when engaged in operations in the Pacific. They were in all respects in a full condition of readiness as a "floating magazine" of the United States Navy (R. 13). The cargos of ammunition aboard the vessels were subsequently discharged at several different ports in the United States (R. 19, 23).

During all of the time the naval vessels were held in Port Discovery Bay, the United States was at war and hostilities had not terminated. Res. Dec. 8, 1941, 55 Stat. 795, et seq. (App. Prec. Section 1, Note, Title 50, U.S.C.). In fact, the termination of hostilities was not proclaimed by the President until December 31, 1946 (Proclamation 2714, Dec. 31, 1946,

12, F. R. 1) (U. S. Code Congressional Service, 80th Congress, First Session, 1947, page 1895).

The District Judge granted the motion to dismiss.

II. ARGUMENT

1. AN ACT OF CONGRESS WAIVING SOVEREIGN IMMUNITY MUST BE STRICTLY INTERPRETED FAVORABLY TO THE GOVERNMENT.

The Federal Tort Claims Act was approved August 2, 1946 and amended on August 1, 1947. We are not here concerned with the amendment.

Subchapter I of the Act (Secs. 921-922, T. 28, U.S.C.) provides for the administrative compromise of a tort claim not exceeding \$1,000.00 by the head of the Administrative Agency concerned.

Subchapter II of the Act provides for suits on tort claims against the United States. By Section 410(a) (Sec. 931, T. 28, U.S.C.), exclusive jurisdiction is conferred on the United States District Court for the District wherein the plaintiff is a resident or the act or omission complained of occurred, sitting without a jury, "to hear, determine, and render judgment on any claim against the United States, for

money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages:"

Subsection (a) further provides that in death cases, notwithstanding the law of the place where the act or omission occurred, the United States shall be liable only for compensatory damages and provides for the allowance of costs except that such costs shall not include attorneys' fees.

Subsection (b), Section 410, provides that a judgment against the United States shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

whose act or omission gave rise to the claim; that if a claim is presented to a Federal agency pursuant to Subchapter I, an action cannot be maintained on the claim unless the Federal Agency involved has made a final disposition of the claim or the claimant has upon fifteen days' notice given in writing, withdrawn the claim from consideration by the agency. It further limits the amount of the claim under Subchapter I to the amount of the claim presented to the agency except where the increased amount is shown to be based on newly discovered evidence not reasonably discoverable at the time of the presentation of the claim, or upon evidence of intervening facts relating to the amount and specifically provides that disposition of any claim by an agency shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

Section 411 (Sec. 932, T. 28, U.S.C.) provides that forms of process, pleadings, practice and procedures shall be in accordance with the Supreme Court Rules of Civil Procedure and the same provisions for counterclaims set-off, for interest on judgment, and for payment of judgment shall be applicable as in cases brought in United States District Courts under Section 41(20), 250(1), (2), 251, 254, 257, 258, 287, 289, 292, 761-765 under Title 28.

A review of final judgments in District Courts is provided for in Section 412, (Sec. 933, T. 28, U.S.C.). Appeals may be taken to the Circuit Court of Appeals or to the Court of Claims. Sections 346 and 347 of Title 28, are made applicable in proceedings in the Circuit Court of Appeals and in the Court of Claims to the same extent as to cases in a Circuit Court of Appeals therein referred to.

Section 413 (Sec. 934, T. 28, U.S.C.) gives the Attorney General the authority to compromise and settle claims with the approval of the court in which the suit is pending. The terms "Federal agency" "employee of the Government" and "acting within the scope of his office or employment" are defined in Section 402 (Subchapter III (Sec. 941, T. 28, U.S.C.).

Section 420 (Sec. 942, T. 28, U.S.C.) limits claims cognizable under the Act to one year after accrual of the claim or to one year after August 2, 1946, whichever is later. The limitation is applicable to claims presented to a Federal agency and actions instituted in District Courts. However, in the event a claim not exceeding \$1000.00 is presented to a Federal agency, the time to institute suit is extended for a period of six months from the date of mailing the notice to the claimant by the agency as to the final disposition of the claim or from the date of the with-

drawal of the claim from the agency pursuant to Section 410.

Section 421 (Sec. 943, T. 28, U.S.C.) specifically exempts twelve classes of claims from the Tort Claims Act. The section is as follows:

“The provisions of this chapter shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, or 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act of omission of any employee of the Government in administering the provisions of sections 1-38 of Appendix to Title 50.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority."

Section 422 (Sec. 944, T. 28, U.S.C.) provides for the allowance of reasonable attorneys' fees out of the amount of the recovery and makes it a misdemeanor for an attorney to charge a fee in excess of the allowable amount.

Section 423 (Sec. 945, T. 28, U.S.C.), provides that the remedy provided by the Act shall be exclusive as to all claims cognizable under the Act.

Section 424(a) (Note under Sec. 921, T. 28, U.S.C.) repeals all provisions of law authorizing any

Federal agency to consider and compromise claims on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

Subsection (b) of Section 424 (Sec. 946, T. 28, U.S.C.) provides that nothing contained in the Act shall be deemed to repeal any provision of law authorizing any Federal agency to consider and compromise claims on account of damage to or loss of property or on account of personal injury or death in cases in which such damage, loss, injury or death was not caused by any negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or any other claim not cognizable under Subchapter I of the Act.

The Act is a comprehensive plan waiving the sovereign immunity of the Government. As such, it is in accord with the modern trend of Congressional legislation to abolish the doctrine "the King can do no wrong", (Tucker Act, Suits in Admiralty Act, Public Vessels Act) and a desire of Congress to free itself from the ever-increasing burden of considering private claim bills. In Section 410, Congress uses broad

and general terms. But Congress, further recognizing that the essential activities of many of the Federal Departments, particularly the War, Navy and Coast Guard, would necessarily result in a large volume of litigation, in Section 421, circumscribed in very important respects, this broad grant. Among the classes of claims abolished by the exemption section are those claims arising out of the combatant activities of the military or naval forces during time of war (Sec. 421(j)).

The Act being a relinquishment of sovereign immunity involving cases where the suit is directly against the Government must be strictly interpreted. *Schillinger v. United States*, 155 U. S. 163, 166; *Eastern Transportation Company v. United States*, 272 U. S. 675, 686; *United States v. Michel*, 282 U. S. 656; *Klamath Indians v. United States*, 296 U. S. 244, 250; *United States v. Sherwood*, 312 U. S. 584; *Wallace v. United States*, 142 F. (2d) 240, (C.C.A. 2).

Commenting on the Tucker Act, the Supreme Court in *United States v. Sherwood*, *supra*, said:

“The Act must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of sovereign immunity, must be strictly interpreted.”

The Second Circuit Court in *Wallace v. United States*, supra, tersely stated the general principle that statutes by which the United States yields its immunity from suit must be literally and narrowly construed.

2. CONGRESS INTENDED THAT THE MILITARY AND THE NAVAL DEPARTMENTS OPERATE IN TIME OF WAR UNHAMPERED BY THE THREAT OF DAMAGE SUITS.

In further determining Congress's intention in including subsection (j) in the exemption provisions of the Act, consideration must be given to the express desire of Congress to immunize from threat of damage suits certain activities of the United States which should, in their very nature, operate unhampered. Sen. Rep. No. 1400, 79th Congress, Second Sess. (1946) p. 3. Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Congress, Second Sess. (1942) 44, 45. See also 35 Georgetown Law Review 53.

That the Navy Department be allowed to operate unhampered and without the threat of damage suits in disposing of such dangerous materials as "live" ammunition immediately following the cessa-

tion of actual hostilities is self-evident. Clearly, this was the type of an activity which Congress had in mind when it expressed its desire that certain essential activities of the Government be allowed to operate immunized from threat of lawsuit.

3. THE ACTS HERE COMPLAINED OF AROSE OUT OF COMBATANT ACTIVITIES.

Applying the rule of strict interpretation and narrow construction to the language used by Congress in the exemption, construing the words in their commonly accepted sense and most favorably to the Government, it is apparent that the contentions made by the appellants that the acts complained of by them did not arise during the course of "actual combat" (page 6, Appellant's Brief) or from an "act of battle" (page 12, Appellant's Brief) are not warranted. Appellants arrive at their conclusion by separately defining the phrase "combatant activities", completely ignoring the qualifying words "arising out of". They argue that because the naval ammunition vessels (floating magazines) were removed from the scene of combat the acts did not constitute combatant activities and since the vessels were not engaged in combat, the exemption cannot apply.

As previously stated, this contention ignores the

qualifying words "arising out of". Under the uncontradicted facts as set forth in the affidavits in support of the motion to dismiss there can be no question that the instant claim arises out of the combatant activities of the naval forces. The voyage or the task assigned to these naval ammunition ships was not completed. They had been engaged for long periods of time in operations in enemy waters in forward areas supplying and rearming the combat vessels of the task forces of the Pacific Fleet at sea, so that those vessels could continuously maintain operations against the enemy.

As stated by the District Judge in his decision on the motion to dismiss (R. 33):

"Were it not for the supporting services, such as supply ships and ammunition carriers, the battle could not last long. And as long as there is any necessity for obtaining an unbroken line of ammunition supplies to the war combat vessels, and a ship such as those ships named were so engaged in supplying that ammunition, the Court has no alternative other than to find that such activity of the supplying vessel, * * * is engaged in combatant service within the statutory exemption of combatant activities respecting which the Government has not consented to be sued."

Appellants find comfort in the fact that the naval ammunition ships were waiting to discharge their

cargos. This argument is unsound. Clearly, the vessels had been engaged in combatant activities. Their character as supporting supply vessels in those activities was not lost under the circumstances of this case for several reasons. A state of war still existed. The cessation of hostilities had not been declared by the President. The Navy was still faced with the task of keeping its "powder dry" and its "guns cocked". A large quantity of ammunition of use to the naval forces had to be returned. The mission of the ammunition vessels was not completed until their cargos were returned and safely stowed. The facilities at which the hazardous ammunition cargos could be discharged were extremely limited. The normal hazards arising out of handling their cargos of "live" ammunition were great. Because of the limited facilities, an extra-hazardous condition in the harbors of the United States existed. The Navy was faced with the grave problem of protecting life and property in the harbor areas. The only way this purpose could be accomplished was to place the vessels in anchorages where loss of life or damage to property would be greatly minimized. Port Discovery Bay was such an anchorage.

To say that these conditions did not arise out of combatant activities is to belie the English language.

If it had not been for the war, the necessity of supplying ships through the medium of these vessels and the resulting necessity of returning the ammunition for future use, particularly in the times of stress under which the United States now finds itself, then it would not have been necessary for these vessels to have been held in Port Discovery Bay. Clearly, under the uncontradicted facts set forth in the affidavits, the act of the Navy Department in establishing an explosive anchorage in Port Discovery Bay was a necessity dictated by and arising from the combatant activities of the naval forces.

Further, the vessels, while at anchorage in Port Discovery Bay, were in full readiness to sail at a moment's notice if required to enforce the surrender of Japan or for any other combat purpose. They were and remained component parts of the Pacific Fleet of the United States Navy which was at that time engaged in enforcing the surrender and policing the many far-flung danger points in the Western Pacific and along the coast of Asia.

4. THE ACTS HEREIN OCCURRED DURING TIME OF WAR.

Under the doctrine of literal interpretation and narrow construction, the meaning of the phrase "dur-

ing time of war" is self-evident (*Wallace v. United States*, supra). It is admitted that the United States was in a state of war in 1945 and 1946 and is still in a state of war. In fact, in 1945 until December 31, 1946, when the President terminated hostilities by proclamation, we were technically in a state of hostilities.

It must be conceded that Congress in adopting the phrase "during time of war" had in mind the rule that until a peace treaty is signed, the nation continues to be engaged in war. To say that Congress did not consider the full meaning of the phrase in adopting the language used by it would not be logical.

The words "time of war" cannot be separated from the context of all of the language used by Congress in drafting the exception. *Eastern Transportation Co. v. United States*, supra. This language is "Claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." As repeatedly stated by us, there can be no doubt that the acts complained of arose out of those circumstances.

Further, to say that it was Congress's intention to limit the words "during time of war" to time of actual combat, as contended for by appellants is not warranted. The words must be interpreted in the

light of the function they were designed to accomplish, in this case, to allow the Navy, without fear of lawsuits to return the ammunition ships recently engaged in actual combatant activities to their home ports and there to safely unload their cargos without unnecessarily endangering life and property.

Appellants cite several cases involving litigation interpreting the phrase "time of war" as applied to contracts between private parties and other cases interpreting similar terms. Each of the cited cases must be read in the light of its particular facts and the purpose to be accomplished. So read, none of them appear to be of any value in determining the instant question. In this connection the following language in *State ex rel Peter v. Listman*, 157 Wash. 229, 288 Pac. 913, cited by appellants is apropos:

"In this respect words in a given setting and for a particular purpose may mean and often must be considered to mean a different thing than what they do in some other setting."

III. CONCLUSION

It is submitted that under the admitted facts of this case, the claim arises "out of the combatant activities of the * * * naval forces * * * during time of war", and the District Court does not have jurisdiction to entertain the action. The order of the Dismissal should be affirmed.

Respectfully submitted,

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No. 11952

United States
Circuit Court of Appeals
for the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY, LIMITED, a corporation,	Appellant,
vs.	
CIRACO MANEJA, et al.,	Appellees.
and	
CIRACO MANEJA, et al.,	Appellants,
vs.	
WAIALUA AGRICULTURAL COMPANY, LIMITED, a corporation,	Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 256

FILED

AUG 18 1948

PAUL P. O'BRIEN

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

No. 11952

United States
Circuit Court of Appeals
for the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY,
LIMITED, a corporation,
Appellant,
vs.
CIRACO MANEJA, et al.,
and
Appellees.
CIRACO MANEJA, et al.,
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Upon Appeal from the District Court of the United States
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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Territory of Hawaii

Civil No. 787

WAIALUA AGRICULTURAL COMPANY,
LIMITED,

Plaintiff,

vs.

Ciraco Maneja, Takeo Miyazaki, Cerilo Lendio, Antone Vierra, Augustine Lorenzo, Haru Kibota, Tadao Watanabe, Koichi Okouchi, Domingo Menor, Tsuruo Hayashi, Cornelio Asuncion, Roque Crisostomo, Peter Holmberg, Hatsusuke Sera, Takumi Okouchi, Pedro Dumlao, Bernabe Hernandez, Domingo Guigui, Ushinosuke Kondo, Teruichi Kubo, Masaiki Oato, Simon Cumlat, Apolonio Lazo, Giichi Hamamoto, Dionicio Carrit, Seraphine Robello, Toshio Tanaka, Barney Faria, Fumio Sunahara, Hirosaku Takata, Kiichi Yamada, Alfred Reyher, Masaru Ezawa, Damaso Claunan, Antone Robello, Manuel Damas, Keichi Kamiyama, Yoshiji Yamada, Edwin Mori, Genjiro Hironaka, Jiro Sakai, Margaret Fujiwara, Louis Pacheco, Yukishige Tsutsui, Yack Chun Lee, Eiko Sakaguchi, Moses Fernandez, and Toshio Kashiwabara, individually and as representative of all other employees of plaintiff who are similarly situated; Local 145-7 of the International Longshoremen's and Warehousemen's Union, and Jack Hall, Regional Director, Territory of Hawaii, of the International Longshoremen's and Warehouse-

men's Union, individually and as representative of all employees of the plaintiff who are named herein as defendants and of all other employees of the plaintiff who are similarly situated,

Defendants.

COMPLAINT

I.

Allegations of Jurisdiction

This action arises under the Fair Labor Standards Act of 1938 (the Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. Sections 201 et seq.) hereinafter sometimes called the "Act," which is a law regulating commerce, and is [5] brought to secure a declaratory judgment. This court has jurisdiction pursuant to Section 24 of the Judicial Code as amended, 28 U.S.C. Section 41(8) and pursuant to Section 274d of the Judicial Code, 28 U.S.C. Section 400.

II.

Parties and Nature of Action

2. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii, with its head office located in Honolulu, City and County of Honolulu, Territory of Hawaii, and with its plantation, where it produces sugar cane, processes it into raw sugar and conducts related operations, located in the District of Waialua, City and County of Honolulu, Territory of Hawaii.

3. Defendants are (a) employees of plaintiff engaged in performing work on or about the plaintiff's plantation, (b) the local union, an unincor-

porated association, which is the collective bargaining representative of such employees and of all other employees of the plaintiff engaged in performing similar work, and (c) the regional director of the International Union, an unincorporated association, with which such local union is affiliated.

4. Each of the employee defendants herein is made a party in his individual capacity and also as representative of all of the plaintiff's employees who are engaged in performing work similar to the work of said employee defendants, and the defendant local union and defendant regional director are made parties in their individual capacities and also as representatives of all the said employee defendants and of all other employees of the [6] plaintiff who are engaged in performing work similar to the work of said employee defendants, as all of said employees of plaintiff constitute a class so numerous as to make it impracticable to bring them all before the court, and the parties named as defendants herein represent all of said employees so as fairly to insure the adequate representation of all of said employees, and the character of the rights sought to be enforced by the plaintiff against all of said employees is several, there are common questions of law and fact affecting the several rights and a common relief is sought.

III.

Statement of Controversy

5. The controversy between the parties hereto relates to the judicial construction of Sections 3(b),

3(f), 3(j), 6, 7(a), 7(c), and 13(a)(6) of the Act.

6. Plaintiff contends:

(a) That all of the employee defendants, as well as all other employees of plaintiff similarly situated, are employees “employed in agriculture” as the term “agriculture” is defined in Section 3(f) of the Act and that, therefore, such employees are exempt from the overtime provisions of the Act i.e. Section 7(a), as provided by Section 13(a)(6) of the Act;

(b) That if any of said employees is not so exempt by virtue of said Section 13(a)(6), he is an employee in a place of employment where his employer i.e. the plaintiff, is engaged in the “processing of . . . sugarcane . . . into sugar (but not refined sugar) or into syrup . . .” and that, therefore, as provided by Section 7(c) [7] of the Act, such employee is exempt from the overtime provisions of the Act i.e. Section 7(a); and

(c) That the employee defendants, when they are engaged in work in connection with the repair and maintenance of the plantation houses and related facilities hereinafter described, and all other employees of plaintiff when they are engaged in performing similar work are not “engaged in commerce or in the production of goods for commerce” as the terms “commerce” and “produced” are defined in Sections 3(b) and 3(j) of the Act and that, therefore, none of the provisions of the Act applies to said employees, whether or not said employees are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c).

7. Defendants contend and have done so repeatedly to the plaintiff;

(a) That none of the employee defendants and no other employees of the plaintiff who are similarly situated are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c) or otherwise; and

(b) That all of the employee defendants and all other employees of the plaintiff who are similarly situated are "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7(a) of the Act.

(8) Some of the employee defendants and other employees of plaintiff instituted a suit in this Court against the plaintiff on November 14, 1945, under Section 16(b) of the [8] Act to recover unpaid compensation allegedly due them, which suit, by stipulation of the parties, resulted in judgment for the plaintiffs therein entered January 25, 1946. Said stipulation provided that defendant therein (plaintiff here) did not admit the correctness of the interpretations of the Act and the contentions asserted by plaintiffs therein. Said judgment specifically recited that "In any litigation which may hereafter occur between the plaintiffs or any of them and said defendant, including the respective privies of the plaintiffs or any of them or of said defendants, with respect to liability under the Fair Labor Standards Act for any period subsequent to the 25th day of January, 1946, neither . . . this judgment shall operate as *res judicata* or as an estoppel or otherwise as determinative or evidentiary with respect to the

application of the Fair Labor Standards Act or of any of its provisions to the plaintiffs or to any of them or to the defendant or to any of said privies or with respect to any issue of fact or issue of law which is or which has been or which might have been raised in the above entitled cause." On or about the date said judgment was entered, defendant Local 145-7 of the International Longshoremen's and Warehousemen's Union and the International Longshoremen's and Warehousemen's Union made an agreement with the plaintiff that they would cooperate with the plaintiff in the institution and prosecution of test suits to determine whether or not employees to be selected by the plaintiff are covered, and if so, to what extent, by the provisions of the Fair Labor Standards Act. [9]

IV.

NECESSITY FOR RELIEF OF DECLARATORY JUDGMENT

9. The controversy of the parties relates solely to whether plaintiff is required to pay the employee defendants and all other employees similarly situated overtime compensation in accordance with Section 7(a) of the Act. Without a determination of the controversy herein it is impossible for the plaintiff to know and ascertain whether it is violating the Act in not paying overtime compensation to said employees in accordance with Section 7(a) thereof. In the contentions of the defendants are correct the plaintiff will be subject to (a) overtime and liquidated damages, attorneys' fees and costs, as provided in Section 16(b) of the Act; (b) a mul-

tiplicity of suits under said Section 16(b) with consequent vexation, cost and expense of defending said suits (c) suits brought under Section 16(b) of the Act in different jurisdictions—in the United States District Court or Territorial Courts—and the delays incident to final determination and the chances of different adjudications by different jurisdictions; (d) delay in settlement of the controversy if the final determination of the legal question is left to adjudication in suits brought under Section 16(b); (e) strikes and labor disturbances if it fails to comply with the contentions of the defendants; (f) great expense in paying overtime compensation in accordance with the provisions of Section 7(a) of the Act to the employee defendants and other employees of plaintiff engaged in work similar to that of the employee defendants and in planning and instituting new methods of operation resulting in great loss and damage to it in order to meet the expense of paying such overtime, if, by reason of the defendants' contentions and the perils of not [10] complying with same, plaintiff feels compelled to endeavor to comply; and (g) a danger that the marketing of raw sugar and molasses produced by it may be hampered or prevented under the provisions of Sections 15(a)(1) and 17 of the Act. Said Section 15(a)(1) renders it unlawful to ship in interstate commerce or to ship, with knowledge that shipment in interstate commerce is intended, any goods in the production of which any employee was employed in violation of the wage

and overtime provisions of the Act. Said Section 17 confers upon the District Courts of the United States jurisdiction to restrain violations of Section 15 of the Act.

V.

Plaintiff's Operations

10. Since the original incorporation of the plaintiff in 1898, its business has been and continues to be the growing, cultivating and harvesting of sugar cane on lands owned or leased by it; the processing of such sugar cane into raw sugar and molasses; the bagging, loading and shipping of the raw sugar to refineries situated in the continental United States; and the loading and shipping of molasses in bulk to continental United States. The loading of the bagged raw sugar and of the molasses into railroad box and tank cars of the Oahu Railway & Land Company, an independently owned and operated carrier (hereinafter referred to as the "O. R. & L."), at the site of the mill and the pushing of such cars from such site onto a nearby spur of the O. R. & L. complete the operations of the plaintiff and the work of its employees relative thereto. The plaintiff does not engage in any sugar refining operations. As used in this complaint the term "mill" means the building [11] and equipment of the plaintiff used in the actual processing of sugar cane into raw sugar, including cane carrier, cane cleaning plant and scales, crushing plant, boiling house, fire room, power plant, sugar warehouse, and molasses tank, and all equipment therein.

11. Plaintiff operates one of thirty-four (34) sugar plantations located, operating and doing business in the Territory of Hawaii (hereinafter referred to as the "Territory"). The total raw sugar produced by these thirty-four plantations in 1945 was 821,216 tons. Of this amount the plaintiff produced 56,193 tons or slightly less than 7 per cent, and as such it ranked as the third largest producer of raw sugar in the Territory in 1945. The total number of employees of the thirty-four plantations as of September 1, 1946, was 29,517 and was approximately 28 per cent of the total number of persons privately employed in the Territory. The raising of sugar cane and the processing of it into raw sugar constitutes the principal industry in the Territory in terms of the number of persons privately employed, invested capital and the value of the product produced. Between the years 1941 and 1945, the Territory produced between 13.30 per cent and 10.76 per cent of all sugar, both beet and cane, distributed for consumption in the continental United States.

12. Sugar cane is highly perishable and starts to deteriorate immediately after harvesting. To avoid serious losses it must be processed into sugar, syrup or molasses within a few hours after the leaves have been burned or the cane severed from the ground. For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where [12] it is grown. Sugar cane never

moves into interstate commerce in its natural state. Except for small amounts which are used as seed cane, it is grown exclusively for the purpose of producing sugar, syrup or molasses and it is these end products, which are the result of the processing of cane, which become articles of interstate commerce.

13. At the present time plaintiff grows and produces sugar cane on 9,663 acres of land owned or leased by it. Substantially all of the land now devoted to sugar cane production has been owned or leased and used by it for this purpose since 1910. The table set forth in paragraph 33 hereof shows that the number of acres under cane cultivation since 1910 fluctuated above and below the present cane acreage by approximately 10 per cent. The cane growing land of the plaintiff, its buildings and yard area, and other lands owned or leased by the plaintiff, but unsuited for cane growing, including a wooded area from which fire wood is cut for use as fuel by the plaintiff's employees living in the plantation villages hereinafter described, form a contiguous and compact area as shown by Exhibit "A" which is attached hereto and made a part hereof, except that an area of 470.42 acres of cane growing land located on the lowlands at the west end of the plantation is connected with the principal area of the plantation only by a strip of land 40 feet wide and 1,150 feet long, over which the plaintiff has a perpetual easement for rights-of-way for the moving of its field equipment, supplies and sugar cane.

Sugar cane is grown in fields which in one area of the plantation are cut by deep gulches and waste land unsuited for cane production, while in other areas the fields are separated only by plantation roads or public highways. Cane growing land is criss-crossed with [13] a network of plantation field roads and a narrow gauge railroad owned by the plaintiff. Supplies, materials and equipment used for planting, cultivating and harvesting are transported over these field roads. The railroad is used to transport cane from the fields to the mill and to transport some field supplies and harvesting equipment between the plantation buildings and yard area and the fields. There is also a network of irrigation ditches throughout the plantation and a number of water storage reservoirs, since all cane grown on the plantation must be irrigated. All the lands devoted to the growing of sugar cane are managed and operated by the plaintiff as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being plowed and furrowed for new planting, some is being "ratooned" (a process hereinafter described); some acreage is in young growth, some in old growth nearing maturity

and other acreage is being harvested. The growing harvesting and processing of the cane and the marketing of the raw sugar constitute one continuous and year around operation except that annually harvesting and processing of cane are suspended for approximately three (3) months for the purpose of reconditioning the mill and equipment, as hereinafter described.

14. As of September 1, 1946, the plaintiff had a total of 1,144 employees. The plaintiff considers this number of employees sufficient for its operations as conducted at the present time. Its labor requirements are substantially the [14] same throughout the year. The plaintiff has ten (10) job classifications for its rank and file or non-supervisory employees, who numbered 959 as of November 19, 1946. The hourly wage rates for such ten (10) classifications range from a minimum of 80c to a maximum of \$1.38. The plaintiff, however, employs 12 handicapped, superannuated and part-time workers who receive a minimum hourly wage of 74c. The weighted average hourly wage rate for all non-supervisory employees of the plaintiff is 90.8c. The existing collective bargaining agreement dated November 19, 1946, between the plaintiff and the defendant International Longshoremen's and Warehousemen's Union, Local 145-7, as collective bargaining agent for most of the non-supervisory employees, which contract sets forth the wages, hours and working conditions of the employees herein involved, is attached hereto as Exhibit "B" and made a part hereof.

15. All plantation operations and activities are under the over-all direction and control of the plantation manager. Under him as immediate assistants are the assistant manager and three staff assistants, the field and mill coordinator, and the personnel training and development director. The various plantation operations are each under the supervision of a manager or superintendent as follows: Field operations, the field superintendent; mill and allied shop operations, the cane processing superintendent; warehouse, the warehouse superintendent; construction, the construction superintendent; accounting, the office manager; and civil engineering, the civil engineer. All of these superintendents are responsible to the plantation manager.

16. The plantation buildings, including the mill which processes the cane into raw sugar, a number of buildings [15] housing repair shops for the maintenance of field, transportation and mill equipment, warehouses for plantation supplies, and other buildings having functional relation to the entire plantation operations, are centrally located on the lowlands of the plantation in a small compact and contiguous area. The administration offices of the plaintiff are located on the plantation within a distance of not more than one-fourth ($\frac{1}{4}$) of a mile from the other buildings.

17. On its plantation plaintiff prepares and plows the fields for the planting of sugar cane; plants sugar cane; ratoons the fields ("ratooning" is a term referring to the operations performed after a field is harvested to prepare the field for

the growing of another crop. In such preparation the old cane stools or stubble are left in place and the ground is refurrowed into rows. The undamaged cane stools or stubble will then send up new shoots upon application of water and fertilizer to the field. New seed is added to fill in blank spots or to replace damaged stools or stubble); cultivates sugar cane; applies fertilizer to cane fields; irrigates cane fields (a map showing the irrigation system on the plantation is attached hereto as Exhibit "C" and made a part hereof); harvests sugar cane; maintains a network of field roads for the transportation of labor, field supplies, and equipment throughout the plantation; and transports sugar cane by a narrow-gauge railroad from the fields where grown to the mill (a map, showing the transportation system of the plaintiff, the railroad, and the field roads and public roads, is attached hereto as Exhibit "D" and made a part hereof). At the mill the plaintiff cleans the sugar cane; crushes it in order to extract the juices therefrom; produces raw sugar and molasses from such juices; and loads bagged raw sugar and [16] molasses in railroad cars for shipment to the continental United States, or stores such products temporarily in the sugar warehouse or molasses tanks.

18. From the time the plaintiff was organized, and continuing to the present, the plaintiff has owned and operated the narrow gauge railroad system referred to in paragraph 17 hereof. This railroad system is constructed, located and operated

exclusively on the plantation. It hauls no cane or freight for anyone other than the plaintiff. It is used predominately by the plaintiff for the purpose of hauling sugar cane from the fields of the plantation to the mill. It is also used to a much lesser extent to haul portable rails and other field supplies and equipment from the plantation warehouses and shop yards to and from the fields.

19. Under normal operating conditions the bagged sugar after leaving the mill is loaded directly into railroad box cars for shipment. Due to the limited number of cars and storage space at the port wharves and occasional interruptions in ship schedules, the sugar may be stored temporarily from time to time in the plantation sugar warehouse. Raw sugar is never stored at the plantation because of price, market, or other economic considerations. The most efficient and profitable operations call for shipment to mainland refineries immediately upon production. In addition to sugar, all of the empty sugar bags, in bales of one thousand to six hundred bags each, are stored in the warehouse. Due to a shortage of warehouse space, fertilizer is also stored in bags in this building from time to time.

20. Production in the mill operations of plaintiff is keyed basically to a six-day week with continuous and around-the-clock operations, the mill stopping the crushing [17] of cane at 2:00 p.m. on Saturdays and starting up at 2:00 p.m. on Sundays. The 24-hour day is divided into three 8-hour shifts

running from 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m.

21. The weekly 24-hour shutdown period of the mill is necessary to perform cleaning and repair operations. While, in general, repairs are performed during the week-end, every effort is made to anticipate week-end requirements and the various shops located near the mill perform as much work as possible while the mill is in operation.

22. All of the cane processed by the plaintiff's mill on the plantation is produced on the plaintiff's plantation and by the plaintiff.

23. The extraction of the juices from the sugar cane fibre and the processing of such juices into raw sugar require large amounts of power. It is therefore traditional in sugar cane processing to utilize bagasse (the cane fibre remaining after the juices are extracted from the cane stalks) as an economical source of fuel for the production of power for use in performing the various processing operations. An average of approximately three thousand tons of bagasse is produced each week by plaintiff when its mill is operating at full capacity. When dried one ton of bagasse has a fuel value approximately equivalent to two barrels of fuel oil. Fuel is also essential in the processing operations for the production of steam for heating and evaporating of the juices and the crystalization of the sugar. Fuel is also used to produce steam for the generation of electric power needed in the various operations of the plantation, as will be hereinafter

more fully described. If the bagasse were disposed of as waste, other fuel would have [18] to be obtained in order to obtain steam. If the bagasse were not utilized as fuel, a difficult disposal problem would be presented because of its bulkiness and the large volume involved. Bagasse produced by the plaintiff has no marketable value. The room in which the bagasse is burned and the steam is produced is known as the fire room and is located in the mill adjacent to the crusher room. Plaintiff attempts to save and store enough bagasse during the week to meet the requirements for operating the boiler furnaces on week-ends when cane is not being crushed. Sufficient quantities of bagasse are not always available to satisfy the fuel requirements of the mill. This condition occurs during periods of breakdown of machinery and during periods of wet weather when harvesting and processing operations are slowed down by reason of heavy trash contents. The boiler furnaces are therefore equipped to burn fuel oil which is stored in a concrete fuel oil tank located in the mill yard near the fire room for convenience of supply.

24. The electric power generating equipment of the plaintiff is located in the mill. It consists of one 6600 volt generator driven by a steam turbine and two 440 volt generators driven by reciprocating steam engines. The electric power generated by this machinery is generated from steam produced in the boilers in the fire room, which passes through the generating machinery and is then conveyed

through steam lines for use in the processing operations in the boiling room. Electric power generated is not sufficient to supply the needs of the plaintiff. For the purpose of supplementing the power generated, electric power is purchased from the Hawaiian Electric Company, Limited, an independently owned and operated public utility on the Island of Oahu. During the period [19] 1941-1945 inclusive, power generated in the plaintiff's system represented $64\frac{6}{10}$ per cent of the amount consumed. The remaining $35\frac{4}{10}$ per cent was purchased from the Hawaiian Electric Company. The power generated and purchased by the plaintiff is distributed to the mill, field irrigation pumps, repair shops and related buildings, domestic water pumps, plantation houses and services and to several small non-plantation users living in the plantation community who, because of their location, cannot be conveniently served from the present transmission lines of the Hawaiian Electric Company. The electric transmission lines representing the distribution system of both the plaintiff and the Hawaiian Electric are shown on the map attached hereto as Exhibit "E." The total amount of power used by all non-plantation users is approximately one-half of one per cent of the total power distributed by the plaintiff and is becoming less because these users are constantly being absorbed by the Hawaiian Electric as it extends its transmission lines. None of the electric power distributed to non-plantation users by the plaintiff is

used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce nor is it transmitted into interstate commerce. During the off season the turbines, steam engines, generators, motors and auxiliary equipment in the mill are overhauled and reconditioned and during such period the plaintiff generates no electric power but purchases all of the power which it needs from the Hawaiian Electric Company.

25. Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and major overhaul. Machinery breakdowns in the mill may result in a shutdown of the entire mill which, in turn, necessitates a discontinuance of harvesting and transportation operations until mill repairs are completed. Breakdown of harvesting machinery or of cane transportation facilities in turn may result in a shutdown of the entire mill. Repair shops are located in an area extending not more than 300 feet from the mill building. The location of the various service shops is shown on Exhibit "F" which is attached hereto and made a part hereof. A list of the shops and a brief description of the work which is performed by their personnel is as follows:

(a) Machine Shop. Practically all the machining work of the plaintiff, except heavy work required by the mill, railroad and shops, is done in the machine shop. A substantial part of all machine shop

work is for the mill; the remainder is in connection with the other activities of the plantation. During the off season, mill work done by the machine shop accounts for 85 to 90 per cent of the total man-hours' work performed therein. Work in this shop is fairly uniform throughout the year with peaks in case of emergency mill repairs and during the mill off season. A large portion of the work done by the machine shop personnel is performed within the shop, utilizing shop tools. Shop personnel are, however, from time to time called into the mill, on instructions from the cane processing superintendent, for repairs, regrooving of mill rolls and such other work as cannot be expeditiously handled by mill workers.

(b) Welding Shop. A substantial part of welding shop work is for the mill; the remainder is in connection with the other activities of the plantation. During the off season, welding shop work for the mill represents approximately 90 per cent or more of the total man-hours. Most of the welding [21] repairs to mill equipment are made in the shop, although personnel are dispatched to the point of breakdown on instructions received from the cane processing superintendent. Steel cane car repairs are made alongside the shop building by the shop personnel. The welding shop employees also operate pipe rolls located in the pipe rolling shed. In this work the welding shop employees are assisted by employees from the blacksmith or cane loading machine repair shop.

(c) Blacksmith Shop. The blacksmith shop is

located adjacent to the mill building. A substantial part of the work of the blacksmith shop is for the mill and consists principally of constructing and reconditioning of cane carrier leveling and preparation knives. However, cane car repair work, such as straightening of bars and channels, repair of tractors and caneloaders and field implement work occupy the great percentage of the man-hours in the shop. Work of this shop is therefore uniform throughout the year.

(d) Tinsmith Shop. Main work of the shop is the making and reconditioning of tin irrigation scoops. These scoops are used in quantity in the field for the purpose of deflecting water from concrete irrigation flumes to field irrigation lines.

(e) Cane Loading Machine Repair Shop. This shop performs all major repairs and overhaul of caneloaders, grabs and miscellaneous field equipment. Men from this shop are occasionally called upon to assist in the emergency mill repairs. They also go into the field to make repairs on cane loading machines during the course of harvesting operations. One function of this shop is the construction of auxiliary field equipment, such as subsoilers used in plowing, cane line reshapers used to maintain irrigation water lines in the field, and portable track line leveler attachments used in [22] leveling the lines for laying portable tracks. Repairs on such auxiliary field equipment are also made in this shop with the assistance of tractor repair shop personnel. During the off season following the completion of harvesting, most of the cane loading ma-

chine operators are brought into the shop to supplement the regular crew and assist in overhaul. Most of the caneloaders and cane grabs are overhauled and reconditioned during the off season and all other cane grabs are repaired at that time.

(f) Tractor Repair Shop. Employees in this shop are supplemented during the off season by tractor operators brought into the shop from the field to assist in repairs. All tractors used in the harvesting field are overhauled in this shop during the off season. Tractors used for towing cane line reshapers are also overhauled during the off season. Other tractors which cannot be overhauled during the off season are scheduled for overhaul during the operating season. Tractor engines are overhauled at regular periods. Shop men may be dispatched for repairs of tractors in the fields. As indicated above under (e) personnel from this shop also assist in the repair of field implements in the cane loading machine repair shop.

(g) Garage. The primary work of the garage is the maintenance, repair and servicing of the plaintiff's motor vehicles. These vehicles assigned to the various operations of the plantation. Overhaul of cars and trucks is scheduled throughout the year with the exception of pickup trucks used by the harvesting men which are overhauled during the off season. Complete servicing equipment with necessary personnel is also maintained. Field service covers the daily lubrication of all equipment and replenishing of fuel tanks.[23] Completely equipped

service trucks service all field equipment except that in the harvesting fields.

(h) Electric Shop. This shop is responsible for the repair and maintenance of electric pumps and transmission lines, domestic wiring repairs, including wiring of houses, and the building of new electrical appliances. A small amount of work is done on electrical machines located in the other shops. Approximately 50 per cent of the work in this shop is for the mill. During the off season, approximately 70 per cent of all work is for the mill. Some of the employees in this shop are mill electricians who work two weeks in the mill and one week in the shop.

(i) Carpenter Shop. The carpenters perform all carpenter work on the plantation, which includes the construction of mill scaffoldings, construction and maintenance of railroad trestles and wooden gates for flumes, and the construction and maintenance of cane cars. In addition they perform necessary maintenance work on plantation buildings and houses. The carpenters also install and maintain steel and concrete pipelines and siphons. Miscellaneous construction, such as construction of tool lockers, scrapers and strainers, is performed in this shop. During the off season, the work of the employees in this shop is similar to that in the operating season. Additional men are brought in from the fields to assist in cane car overhauling and general carpentry work during the off season.

(j) Paint Shop. This shop performs all painting work on the plantation buildings including houses,

and also occasionally the painters paint siphons and railroad trestles. As a general rule, the employees in this shop do not paint for the mill, this work being done by mill employees. Almost [24] the entire time of the paint shop crew is devoted to painting of plantation buildings and houses throughout the year. During the off season, additional employees are brought in from the fields to assist in the work of this shop.

(k) Plumbing Shop. The employees of this shop perform all plumbing work on the plantation, including the construction and maintenance of sewer and water systems and the plumbing for buildings and houses. Assignments vary little throughout the year. During the off season, a few field employees are assigned to the plumbing shop as helpers.

(l) Roundhouse. The employees in this shop service, clean, and fire the plaintiff's locomotives. Additional employees are occasionally assigned to this shop for minor locomotive repairs.

26. Various chemical tests are made by the laboratory personnel in the course of all field and mill operations. By various kinds of careful analyses performed relative to the cane and materials in the course of growing, cultivating and harvesting and extraction of the sugar juices, all operations are controlled pursuant to scientific methods.

27. The plaintiff operates its own concrete products plant which is located on plantation lands adjacent to the plantation buildings and yard area. This plant is engaged primarily in producing concrete irrigation flumes and water supply pipe. It

also makes some blocks, footings, sidewalk slabs and other various incidental concrete products required by the plantation. These operations do not have any off season. During the off season, however, additional personnel may be brought in from the fields.

28. Materials and supplies purchased for plaintiff's operations are warehoused or stored in several buildings [25] located in the plantation buildings and yard area. The total value of goods procured during a year including stock and special order materials averages slightly over \$1,000,000. The principal buildings in which the supplies and materials of the plaintiff are stored are the general supplies warehouse and the heavy supplies warehouse. They house electrical goods, building hardware, paints, window screening, tractor and cane loading repair parts, copper tubing, pipe stock, metal shapes stock, galvanized sheeting, steel sheets and many other items. Other storage facilities for plaintiff's supplies are an oil storage warehouse, fuel tanks, space in the garage, cement warehouse, lime room in the mill, and lumber yard adjoining the general supplies warehouse.

29. The location of the main administration office is shown on Exhibit "A" and is about fifteen hundred feet from the plantation buildings and yard area. The manager, assistant manager and staff assistants, including the accounting office employees, the civil engineer and staff (the staff works alternately in the office and in the fields), one draftsman, the agriculturist, and industrial relations section, have their offices in this building.

30. The plaintiff has one main stable near the plantation buildings and yard area. Horses are used by the harvesting overseer to ride in the fields. Pack mules are used upon occasion to pack seed, fertilizer, broken concrete flumes and other things in and out of the cane fields. The plaintiff has several feeding stations for horses and mules where they are kept temporarily while work is being performed in a particular area.

31. For efficient operations sugar mills of the Territory must be closed down annually for general repair [26] and reconditioning because of the heavy wear and tear on mill machinery and equipment. That part of the year when the mill is shut down for repairs is termed the "off season." Because of the little variation in climatic and weather conditions from month to month, sugar cane is grown the year around in the Territory and can be harvested and milled any month in the year—and frequently is. The amount of sugar recovered per ton of sugar cane, however, varies somewhat throughout the year and is highest during the months of May, June and July. The variation during the year in the ratio of sugar recovery per ton of cane has some influence on the time selected by a plantation for closing down for annual repairs. The selection of the off season is also influenced by wet weather which may make it more difficult to move harvesting machinery in the fields and to burn the leaves from the cane. Exhibit "G" attached hereto and made a part hereof is a date schedule of the off seasons for all plantations in the Territory from

1940 to 1945 inclusive. While it will be seen from this Exhibit that some plantations harvested and milled cane each of the months of the year sometime during this six-year period and that the duration and particular months of the year embraced in the off season differed considerably between the plantations, the majority of the plantations selected their off season sometime during the months of October, November, December and January. Operational difficulties, labor problems, shortages of equipment and other factors frequently make it impossible for a mill to close down during the season when operations are most disadvantageous. For example, the sugar industry of the Territory was on strike from September 1, 1946 to November 19, 1946. As a result of this strike, most plantations of [27] the Territory milled sugar cane during the month of December of that year. The length of the off season for the sugar industry in the Territory averaged from 2½ to 3 months per year from 1940 to 1945 inclusive as shown by Exhibit "G." But for the plaintiff it averaged approximately three months per year for this period, the dates of which were as follows:

SCHEDULE SHOWING "OFF SEASON"

Year		From	To
1941.....	Aug.	30, 1941	Jan. 26, 1942
1942.....	Oct.	6, 1942	Jan. 22, 1943
1943.....	Oct.	1, 1943	Jan. 17, 1944
1944.....	Sept.	12, 1944	Jan. 9, 1945
1945.....	Oct.	3, 1945	Jan. 15, 1946

During the off season for the plaintiff, there are no harvesting, ratooning, cane transportation, or cane processing operations. All field operations

other than harvesting, ratooning and cane transportation continue throughout the year.

32. During the off season extensive repairs are necessary because of severe operating conditions in the mill. Only during a shutdown period can extensive repairs and alterations be made. If these repairs were not done annually, shutdowns would be frequent and excessive losses would be incurred. Most of the off season repair work is done by the men who operate the mill during the crushing season. Off season work is generally commenced on a three-shift basis. It is necessary that parts going to Honolulu for repairs be sent in as soon as possible. Since the crusher room crane is required in taking the mill apart, it is in great demand to start out with and too much time is lost if all of the men work on one or two shifts. In the fire room it is necessary to get ahead with the tube and drum cleaning as fast as possible so the boilers may be [28] inspected. As the off season progresses and the work is spread out, it is practical to go on a two-shift and finally a one-shift basis. The average number of man-days of work performed in the mill during each twenty-four hour period during the off season is 116, irrespective of whether the work is on a three-shift, two-shift, or one-shift basis. This is precisely the same as the average number of man-days of work performed in the mill during each twenty-four hour period during the crushing season, when all work is on a three-shift basis. All mill employees are employed on a forty-eight hour work

week both during the crushing season and the off season.

33. The reduction of man-days required to produce a ton of raw sugar, including all operations from the field to the mill inclusive, is illustrated by the following table, showing the number of employees working for the plaintiff, the total tons of raw sugar produced, the man-days required per ton of raw sugar and the total acres under cultivation, at five year intervals from 1910 to 1945 inclusive:

	Number of Employees	Tons of Raw Sugar Produced	Man Days Per Ton of Raw Sugar	Total Acres Under Cultivation
1910	2,726	30,870	21.2	9,889
1915	2,489	30,697	20.8	10,294
1920	1,824	28,284	19.8	10,622
1925	2,444	29,832	20.7	9,244
1930	2,516	49,981	10.4	9,884
1935	1,619	50,580	8.06	8,573
1940	1,237	57,841	6.9	9,565
1945	951	56,193	4.9	9,415
1946 (9/1)	1,144	-----	----	-----

From the above it can be seen that the number of man-days required to produce a ton of raw sugar in 1910 was 21.2, while in 1945 it was reduced to 4.9 man-days. This reduction in the man-days required to produce a ton of sugar was brought about through mechanization, improved management and the [29] application of scientific methods in irrigating, weeding, plowing, planting, harvesting and the processing of sugar cane into raw sugar. To a great extent hand labor and the use of horse-drawn field equipment and vehicles have been eliminated and motorized equipment substituted in their stead.

34. The total direct operating charges of the plaintiff in operating its plantation for the calendar

year 1945 were \$1,726,278.24. Of this amount \$1,230,393.63 was for cultivating, irrigation water supply, harvesting, transporting of cane and other general field expenses and \$495,884.61 was for operating and repairing the mill and purchasing sugar bags. Thus approximately 71% of the direct operating expenses for the production of a single ton of raw sugar in 1945 was for producing, harvesting and transporting sugar cane to the mill while 29% was for processing. The total number of hours of direct labor attributable to the sugar operations of the plaintiff for the calendar year 1945 was 1,332,679.50. Of this number, 1,024,876.25 hours were for cultivating, irrigation water supply, harvesting, transporting and other work relating to field operations while 307,803.25 hours were for operating and repairing the mill. Attached hereto and made a part hereof is Exhibit "H" showing the total direct operating expenses of the plaintiff for the calendar year 1945, itemized according to the various categories of operation. This Exhibit is a true and accurate copy of a record of the plaintiff which was the basis for a return filed with the Bureau of Internal Revenue by the plaintiff on March 1, 1946, showing direct operating expenses [30] of the plaintiff for the twelve (12) months ended December 31, 1945. Included within the direct operating expenses are all charges for direct labor, materials, electric current, engineering, certain equipment and all other direct service charges as classified and listed on such Exhibit.

35. (a) At the time the plaintiff company was

organized, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane, to accommodate the employees whom the plaintiff needed for its operations. As a consequence, it became necessary for the plaintiff to construct houses, develop services and otherwise build up and establish facilities for permanent living on the plantation to serve the needs of the required number of employees and their families. The plaintiff did this over a period of years and established a perquisite system under which employees received housing, housing maintenance, water, fire wood and kerosene fuel, electricity, medical care, recreational facilities and various maintenance services, including garbage disposal and street cleaning, as a part of their regular compensation. The principal plantation community was established around the plantation buildings and yard area as shown on Exhibit "A" and came to be known as the village of Waialua. After the plantation was established and continued to operate, there gradually grew up an independent community which is now known as the village of Haleiwa, which is located off the edge of the plantation a little more than a mile from the village of Waialua; and in addition, many independently owned and operated stores, shops, restaurants, service establishments and public schools and churches made their appearance on the [31] plantation itself in and around the village of Waialua to serve the

needs of plaintiff's employees and their families living in the area.

(b) By the collective bargaining agreement dated November 19, 1946 between the plaintiff and the defendant International Longshoremen's & Warehousemen's Union, Local No. 145-7, which is attached hereto as Exhibit "B," acting for most of the non-supervisory employees of the plaintiff, the perquisite system was abolished for all such employees, the value of the perquisites previously allowed to employees being converted into cash wages by the plaintiff and the employee in turn paying cash for all facilities and services being furnished him by the plaintiff. The schedule of rent being paid the plaintiff for the occupancy of houses was worked out by collective bargaining with the union and is a part of the bargaining agreement. No employee covered by the existing collective bargaining agreement, including each and every employee defendant herein, is required as a condition of employment to live on the plantation or in plantation houses or to use any service or facility which the plaintiff may be in a position to render its employees. The relationship which exists between the plaintiff and its employees who live in plantation houses is that of landlord and tenant. Employees of the plaintiff as heretofore are continuing to render services and perform maintenance work on plantation houses and village areas.

(c) At the present time the plaintiff owns 820 houses, all of which are located on the plantation. Most of them surround the plantation buildings and

yard area and together with the business establishments of the community constitute the village of Waialua. Approximately 335 houses [32] however, are scattered over the plantation, some of this latter number being clustered and forming field villages. The houses are of frame construction, each house having a yard in front and yard area in the rear which is used for chickens, vegetable gardens or such other purposes as the employees may desire. The lot area for each house may vary from 3,000 square feet to 4,500 square feet or more. The houses face on roads or streets. On the basis of a census which was completed June 30, 1946, the 820 houses on the plantation were occupied by 3,373 persons, 2,952 of whom were employees and pensioners of the plaintiff, and their families. The remaining 421 persons living on the plantation and in its houses were lessees and their families who were not employed by the plaintiff and who either worked off the plantation or who owned, operated or were employed by, independently controlled businesses within it. As of June 30, 1946, there were also 16 employees working on the plantation who lived off the plantation and in houses not supplied or owned by plaintiff.

(d) Waialua village has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and also roads constructed and maintained by the plaintiff. This plantation community offers the usual services and

typical commercial establishments to be found in any small town or village. It has ten (10) general stores, two (2) restaurants, two (2) fish markets, one (1) candy store, one (1) hardware store, one (1) clothing store, four (4) barber shops, one (1) beauty shop, one (1) photographic studio, two (2) automotive service stations, two (2) motion picture [33] theatres, one (1) bank, and other service establishments, all of which are independently owned and operated; a retail store with two (2) branches, an automotive service station and a hospital owned and operated by the plaintiff for both its employees and their families and non-plantation persons; and one (1) post office, one (1) public library, five (5) churches, one (1) intermediate and one (1) high school and one (1) day-care center operated as a part of the Territorial School System. There is also existing in this general area of the plantation two (2) gymnasiums, one (1) club house, one (1) swimming pool, two (2) tennis courts, one (1) athletic field and one (1) beach house, all of which were constructed by the plaintiff and are available to an Athletic Association, the membership of which is composed of both plaintiff's employees and other persons in the general community, which operates these facilities through dues collections. The village of Haleiwa is a small business and residential community which is made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to plaintiff's employees and to surround-

ing community residents, who include persons working at other locations on the Island of Oahu and residents of numerous beach houses and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities. Attached hereto and made a part hereof is Exhibit "I," a map showing the location of Waialua village, field villages of the plaintiff, Haleiwa village and independently owned houses, stores and commercial establishments situated in and about Waialua village, together with the plantation roads and public [34] roads of the area.

36. In those instances in paragraphs 10 to 35 hereof where certain activities and operations of the plaintiff have been described by facts and figures covering a period of time prior to the commencement of this action, such facts and figures represent a substantially true and accurate description of such activities and operations at the present time unless the context otherwise indicates.

VI.

Duties of Employee Defendants

37. Each of the defendants, whose names are hereinafter set forth in paragraphs 38 to 85 hereof, is now, and for a period of at least one year prior hereto has been, an employee of the plaintiff and as such employee has been performing the work and duties set forth and alleged immediately fol-

lowing his or her name and in the manner and at the places and times shown; the work and duties of each such employee defendant have been and are now being performed in connection with and as a part of the plaintiff's operations alleged in paragraphs 10 to 35 hereof; and the work and duties of each such employee defendant are to be considered as further alleged by said paragraphs 10 to 35 to the extent that said paragraphs 10 to 35 are related and applicable to the particular work and duties alleged for such employee defendants in paragraphs 38 to 85 hereof.

38. Ciraco Maneja (Ratooning Tractor Operator)—He operates a 30 H.P. caterpillar tractor with line shaper attachments to prepare ratoon cane field. He makes minor repairs in the field to the machine which he operates and assists in making major repairs to such machine in the tractor [35] repair shop. During the off season and at other times throughout the year, he cuts firewood for use as fuel by the plaintiff's employees living in the plantation villages, hauls stones from the plantation fields on a stone boat sled in order to clear the fields, and assists in the tractor repair shop as a mechanic's helper in repairing tractors. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

39. Takeo Miyazaki (Plowing Employee)—In some work weeks he is engaged exclusively in plowing the fields with a 113 H.P. diesel caterpillar trac-

tor preparatory to planting. In other work weeks he is engaged exclusively in driving a tractor of the same type for other field operations. Occasionally he will also do the following work—operate push rake as relief driver, weed cane fields, haul stones off cane fields with a stone boat sled in order to clear the fields, cut firewood for use as fuel by the plaintiff's employees living in the plantation villages, and assist in the tractor repair shop as a mechanic's helper in repairing tractors. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

40. Cerilo Lendio (Planting Employee)—He operates a 65 H.P. diesel caterpillar tractor making furrows for the planting of cane seed. He makes minor repairs in the field on the machine which he operates. He assists the mechanics in the tractor repair shop in making major repairs on such machine. During the off season and at other times, he assists mechanics in the tractor repair shop, cuts fire wood for use as fuel by plaintiff's employees living in the plantation villages and operates a trench digger machine for pipelines [36] in the fields, drainage ditches in the fields and ditches for domestic pipelines. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

41. Antone Vierra (Truck Driver)—He hauls field labor almost every day in the early mornings and after work. In some work weeks he is engaged

exclusively in hauling fertilizer and other field supplies from the plantation warehouses and yard area to the plantation fields. In other work weeks he is engaged in general trucking operations for the plaintiff, such as hauling field labor over the plantation to and from their places of work in the fields, hauling incoming store freight from railroad box cars to the plaintiff's retail store and hauling cane tops from the fields to plantation stables to feed mules and horses. On rare and infrequent occasions he may also haul mill and other plantation supplies from Honolulu to the plantation. Upon occasions he will also work as a helper in the garage. His work is the same during the off season. All of his work is performed on the plantation except when he is making trips to and from Honolulu, as indicated before. He works under the general supervision of the Field Superintendent.

42. Augustine Lorenzo (Water Supply Ditchman)—He transmits, as received from his supervisor, orders for the amount of irrigation water to be delivered to the plantation each work period from a reservoir. He is responsible for arranging diversion gates in the main plantation supply canal so as to distribute the water in proper proportion to the various delivery ditches on the plantation. He checks water measurement status to insure delivery of the proper amount of water into the system. He is responsible for the [37] proper maintenance of the irrigation canal system under his charge and for reporting immediately any major

breaks or maintenance requirements to the proper plantation authorities. He patrols the ditch lines under his custody to insure proper delivery of water throughout the work day. During the non-irrigation periods, he cleans ditches and tunnels. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

43. Haru Kibota (Steam Pump Operator)—He operates steam generating and reciprocating pump equipment to supply water, approximately 97.0% of which is for irrigation of plantation cane fields and approximately 3.0% of which is for domestic use at a field village of the plaintiff. Such pump and equipment are a self-contained unit and separate installation located on the plantation two (2) miles from the plantation buildings and yard area as shown on Exhibits "A" and "C." He performs all of his work in the steam generating pump house. When the pump is not being operated, he makes repairs to equipment. He works under the general supervision of the Cane Processing Superintendent.

44. Tadao Watanabe (Rake Operator)—He operates a bulldozer rake for making fire breaks preparatory to the burning of cane and for opening track lines for the laying of portable tracks. He operates the same equipment for fighting emergency cane fires. He bulldozes cane under telephone and power lines and out-of-way corners which cannot be easily reached by the regular cane loading

machine. This cane is bulldozed into piles so that it is available to the regular cane loading machine. If he has any minor breakdowns in equipment, he helps the mechanic and welder repair them in the field. He also assists on any major repairs to [38] equipment which are made at the garage or tractor repair shop. During rainy weather and short shutdown periods, he helps haul cane over portable tracks with the same equipment or acts as a common brakeman on the cane cars which are being moved over the portable tracks to the main lines of the railroad. During the off season he acts as a tractor mechanic's helper in overhauling the tractor which he operates and tractors operated by others. Occasionally during the off season he may work on odd jobs in the mill or cut firewood for use as fuel by plaintiff's employees living in the plantation villages. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

45. Koichi Okouchi (Portable Track Plow Operator)—He operates a portable track plow which is used for the leveling of track lines in the making of beds for portable track. Occasionally he will help mechanics and welders in repairing tractors. He also carries portable rail for building spurs into the cane fields and helps repair such rail. During the off season he helps tractor repair shop mechanics repair the equipment which he operates. He may also during this period aid in repairing portable tracks in the yard adjoining the plantation

buildings where permanent repair work to portable rails is done. Towards the end of the off season after the above repair work is completed, he may be used in a variety of odd jobs—such as erecting scaffolding in the mill, cutting firewood for use as fuel by plaintiff's employees living in the plantation villages, weeding and repairing irrigation ditches and unloading of baled empty jute bags used for bagging raw sugar. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

46. Domingo Menor (Portable Track Lifting Machine Operator)—He operates a tractor with boom in the laying of portable track and in the re-loading of portable track in the cane fields of the plantation. He works with a crew. When the weather is too wet to continue operations, he repairs the equipment which he operates and also portable track. During the off season, he assists the principal mechanics in the tractor repair shop in repairing the equipment which he operates. During this period he also helps in permanent repairs of portable track in the yard adjacent to the plantation buildings and yard area. At the conclusion of such repair work in the off season, he performs odd jobs including erection of scaffolding in the mill, cutting firewood for use as fuel by plaintiff's employees living in the plantation villages, weeding and repairing irrigation ditches, unloading of baled empty jute bags used for bagging raw sugar, and on rare occasions loading bagged sugar into box

cars from the warehouse. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

47. Tsuruo Hayashi (Cane Loading Machine Operator)—He operates a cane loading machine in the fields of the plantation. He makes minor repairs to the machine in case of breakdown or aids regular mechanics and welders in doing so. On major breakdowns he aids in transporting the machine from the field to the cane loading machine repair shop in the plantation building and yard area and in making necessary repairs. During the off season, he aids in overhauling the cane loading machine. After this is completed he does odd jobs such as operating shovel machine to clean reservoirs and various irrigation and drainage ditches of the plantation. During the off season, he may also be used in [40] construction jobs or he may help with any mechanical or construction repair work around the mill or in the tractor repair shop. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

48. Cornelio Asuncion (Haul Cane Tractor Operator)—He operates a haul cane tractor. He hauls empty cane cars into the field and full cars out of the field. He repairs minor breakdowns on the tractor he operates and helps a mechanic on any major breakdowns. During wet weather when harvesting stops, he may assist in weeding or cultivating or help clear storm ditches or assist in the re-

moval of irrigation flume preparatory to plowing. In the off season he helps repair cane cars—changing parts and doing general carpentry work on wooden portions of the rail cars. Such repair work is done in the plantation yard. During such period he may also help in repairing portable rails. During the latter part of the off season, he performs many odd jobs and in some work weeks is employed exclusively cutting firewood for use as fuel by plaintiff's employees living in the plantation villages, repairing houses and pruning shade trees, etc. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

49. Roque Crisostomo (Grader Driver)—In some work weeks he is engaged exclusively in driving and operating a motor driven grader for the purpose of leveling and shaping field and village roads of the plantation and installing water drainage to preserve such roads. In other work weeks he is engaged exclusively in operating a grader to build irrigation banks to prevent the run-off of irrigation water, to level off high spots and fill in old ditches in fields preparatory to [41] planting. In other work weeks he may spend a day or two grading around the plantation buildings and yard area or plantation housing areas preparatory to the construction of a new building or house. He may upon occasion in rainy weather work as a helper in the garage or tractor repair shop repairing trucks or tractors, or help load or unload trucks

which carry field, mill or shop supplies. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

50. Peter Holmberg (Locomotive Driver)—In some work weeks he is engaged exclusively in operating a locomotive with a crew, hauling loaded rail cane cars from plantation cane field switches to the mill yard and returning empty cane cars to the plantation cane fields. In some work weeks he is engaged exclusively in spotting loaded cane cars in the mill yard for unloading into the cane carrier and in removing empty cane cars from the mill yard to nearby spurs. In other work weeks he is engaged exclusively in hauling rail cars loaded with plantation freight from the O. R. & L. spur to the plantation yard and warehouses, and in removing rail cars loaded with sugar and molasses from the sugar and molasses loading stations of the plantation to the O. R. & L. siding; also in such work weeks he picks up empty molasses and sugar cars and spots them on the molasses and sugar loading spurs of the plantation. In other work weeks he operates a locomotive for each of the purposes enumerated above. During the off season he assists in making repairs to plaintiff's locomotives. Part of such repair work is done at the plaintiff's roundhouse and part is done in space adjacent to the plaintiff's machine shop, as shown on Exhibit "F." All of his work is performed on the plantation except [42] when and to the extent that he pushes

loaded sugar and molasses cars from the plantation lines onto the O. R. & L. siding. He works under the general supervision of the Cane Processing Superintendent.

51. Hatsusuke Sera (Section Hand on Permanent Tracks)—He repairs permanent tracks and maintains the plaintiff's railroad rights-of-way. He installs field switches for connecting main lines of the plantation to field portable track lines. He cleans rights-of-way. In the off season he repairs permanent tracks and cleans rights-of-way. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

52. Takumi Okouchi (Flagman at Road Crossing)—He flags highway crossings on the plaintiff's railroad to protect motorists. During the off season he cleans and weeds the plaintiff's railroad rights-of-way. In wet weather when cane is not being hauled, he may also weed the plaintiff's railroad rights-of-way. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

53. Pedro Dumlao (Cane Carrier Employee)—He works at the cane carrier one day where he uncouples loaded cane cars preparatory to unloading. He collects cane car tickets, which are placed in the cane cars in the field at the time of loading, showing the type of cane and the time and field at which harvested. He cleans up around the unloading station in the mill. The following day he couples up

empty cars, cleans empty cars, and cleans up around the unloading switch in the mill. The next day he acts as a watchman on the wash carrier, which is part of the equipment in the mill used to clean the cane, to keep it from becoming jammed. The following day he removes stones and foreign material from the cane carrier and maintains the cane carrier full of cane. During the off season he helps to clean up around the cane carrier and helps with repairs on the cane carrier and in the cane cleaning plant. He may also during the off season assist in repairs in the crushing plant. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

54. Bernabe Hernandez (Scales and Cane Cleaning Plant Employee)—He works in the cane cleaning plant for one-half of his working day where he weighs incoming cane cars, notes the gross weight on the cane car ticket and cleans any adhering cane from the car which has been dumped. The other half of his work day he operates machinery in the cane cleaning plant. He operates machinery at the cane cleaning plant for moving incoming loaded cane cars into the cleaning plant, the cane car dumper, the empty car transfer and the machinery for moving out the empty cars. During the off season he helps repair the conveyors at the cane cleaning plant and also helps repair machinery in the crushing plant. All of his work is performed on the plantation. He works under the

general supervision of the Cane Processing Superintendent.

55. Domingo Guigui (Truck Driver)—He is engaged exclusively during the grinding season in trucking away from the mill rock and dirt removed from the cane at the cane cleaning plant. He deposits such rock and dirt in the fields to fill up holes, gulches and ditches. Such trucking operations are required to be conducted 24 hours a day for the entire harvesting period. During the off season he is engaged in general trucking operations for the plaintiff. All of his work is performed on the plantation except that from [44] time to time he may haul plantation supplies from Honolulu to the plantation. He works under the general supervision of the Field Superintendent.

56. Ushinosuke Kondo (Crushing Plant Employee)—He works in the crushing plant maintaining the flow of cane through the crushing mills by regulating the speed of the driving engines. He also regulates the intake or flow of water used to wash out the last removable sugar in the cane fiber. This water is added to the cane before it passes through the last crushing mill. In the off season he repairs crushing plant equipment. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

57. Teruichi Kubo (Boiling House Employee)—He is engaged in one of the steps necessary to process sugar cane juices into raw sugar. He boils

low grade massecuites until crystallization has taken place and proper grain size obtained. He also checks on the boiling of the high grade massecuites or mother liquor. On week-ends he makes minor repairs and, if necessary, cleans vacuum pan tubes used in the boiling house operations. During the off season he makes repairs to boiling house equipment. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

58. Masaiki Oato (Evaporator Station Employee)—He boils sugar juices in a series of evaporators to proper concentration. He also tends the lime mixing station and the clarification station which are in the boiling house of the mill. He makes minor repairs and cleans evaporators over the week-ends and during the off season he repairs boiling house equipment. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent. [45]

59. Simon Cumlat—He works in the boiling house of the mill. He cleans high grade massecuites in machines known as high grade centrifugals and discharges cleaned high grade sugar. On week-ends he cleans evaporator tubes. In the off season he helps clean and repair boiling house equipment. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

60. Apolonio Lazo—He works in the boiling

house of the mill. He cleans low grade massecuites in machines known as low grade centrifugals and discharges cleaned low grade sugar. On week-ends he cleans evaporator tubes. During the off season he helps in cleaning and repairing boiling house equipment. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

61. Giichi Hamamoto (Sugar Bagging Machine Operator and Loader of Sugar)—He operates a sugar bagging machine on sugar flowing from centrifugals. (Sugar passes from high grade centrifugals into the dryer and thence to a temporary storage bin and thereafter through automatic scales to the bagging machine.) The other half of his day he stacks bagged sugar in rail cars, as it is delivered from the mechanical carrier, for shipments to port. In emergencies when shipping facilities are unavailable, he may assist in stacking bagged sugar in the sugar warehouse for temporary storage and later removing same to rail cars. In the off season he paints the interior of mill buildings and the boiling house equipment; he helps on repairs to boiling house equipment; and he installs rigging for lifting boiling house equipment and lifts with chain tackles or mechanical devices. All of his work is performed on the plantation. He works [46] under the general supervision of the Cane Processing Superintendent.

62. Dionicio Carrit (Fire Room Employee)—He works in the fire room regulating the flow of

bagasse to the furnaces and regulating the furnace draft, all to maintain proper steam pressure in the fire room for the operation of mill machinery, power plant machinery and boiling house equipment. At times of mill stoppages he feeds back by hand excess bagasse to the furnaces. During the off season he cleans boilers, drums and tubes and helps to lay furnace bricks for reconditioning of the fire room. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

63. Seraphine Robello (Power Plant Employee)
—He operates power plant electric generating and switching equipment and air compressors. He also makes minor repairs to this equipment. During the off season he makes repairs to power plant generating equipment. (The generating equipment is completely closed during the off season and all power is purchased from Hawaiian Electric Company.) All of his work is performed on the plantation in connection with the generation of electric power for the overall operations of the plaintiff as heretofore described in paragraph 24 hereof. He works under the general supervision of the Cane Processing Superintendent.

64. Toshio Tanaka (Machine Shop Employee)
—During the crushing season he machines parts for both mill and field equipment during the same work weeks. During the off season his work is largely confined to machine operations on the mill equipment, but also from time to time during such

period it is necessary that he perform machine work on field [47] equipment. When a metal part in the cane processing machinery breaks during the crushing season and cannot be welded, he is called in to take measurements for purposes of repair or making a new part as quickly as possible, as the mill is generally required to close down until the repairs are completed, which, if continued for any appreciable time, may result in a considerable financial loss. He may also upon occasion assist in installation or reassembly of a part in machinery. Upon occasion he will go to the cane loading machine repair shop or tractor repair shop or garage to take measurements for repairing or reproducing broken parts. He also machines axles for cane cars during the entire year and machines parts for the locomotives, steam pumps and electric pumps. All of his machine work, however, is done in the machine shop of the plaintiff which is located adjacent to the mill. He works under the general supervision of the Cane Processing Superintendent.

65. Barney Faria (Employee Engaged in Locomotive Repair)—He makes minor and major repairs on all plantation locomotives. Minor repairs are made at the round house located in the plantation buildings and yard area as is shown on Exhibit "F," and occasionally at some places on the main line of the plaintiff's railroad. Major repairs for the most part are made in the welding shop. His work is the same during the off season. During the off season he is assisted by several of the locomotive

drivers. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

66. Fumio Sunahara (Welding Shop Employee)
He is engaged in welding operations, making repairs on mill [48] machinery, irrigation pipe lines, cane cars, locomotives, steam pump equipment and electric driven pumping equipment. The water pumped by such equipment is used for cane field irrigation, by the mill for cane processing, for condensing exhaust steam from power generating units, for domestic use and to supply water to gardens of plaintiff's employees and to a few small farms all of whose produce is consumed locally. When mill equipment requires welding repair during processing operations, he is called to make such repairs as quickly as possible as the mill is generally required to close down until the repairs are completed, which, if continued for any appreciable time, may result in a considerable financial loss. In performing his work, he welds either in the welding shop located adjacent to the mill, or in the mill during crushing operations or at outside points where equipment is being repaired. Occasionally he assists in the repair of field equipment, tractors, trucks and harvesting machinery. Such repair work may be done in the field. Welding of fabricated steel pipes for the irrigation system is done in the welding shop and assembly welding of the pipes is done in the field. He performs the same work during the off season except that the majority

of his work is then performed in the mill. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

67. Hirosaku Takata (Blacksmith Shop Employee)—He works as a smith. He repairs field implements and makes parts for field equipment. He does a small amount of horseshoeing. Two days of each work week during the crushing operations he makes repairs for the mill. He also makes repairs to cane cars and frames of trucks used throughout the plantation operations. During the off season his work is the same. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

68. Kiichi Yamada (Tinsmith Shop Employee)—In most work weeks he is exclusively engaged in making irrigation gates from thin-gauge galvanized metal, which gates are used for diverting water into cane furrows in the fields, in making repairs to auto and truck radiators, which autos and trucks are used throughout the plantation operations, in making small cans for spraying of herbicides in the fields and along roads and irrigation ditches and in maintaining them in repair and in repairing knapsack sprayers used in field spraying. In some work weeks, however, in addition to the above, he makes repairs to mill equipment and on rare and infrequent occasions makes up and installs gutters on mill and shop buildings. Irrigation gates are made and radiators repaired in the tinsmith shop located in the plantation buildings and yard areas as shown

on Exhibit "F"; other work is performed outside at the place of construction or repair, but all of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

69. Alfred Reyher (Cane Loading Machine Repair Shop Employee)—In most work weeks he is engaged exclusively in making repairs to field cane-loaders and to other field equipment such as grabbers, subsoilers and ratooning equipment. In some work weeks, however, and on emergency occasions during the crushing season when there is insufficient manpower available from the machine and welding shops, he spends part of his time assisting in making repairs in the mill. He does more major overhauling on cranes during the off season. The [50] major portion of his work is done in the field during the crushing season and almost exclusively in the shop during the off season. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

70. Masaru Ezawa (Tractor Repair Shop Employee)—In most work weeks he is engaged exclusively in making repairs to tractor and field implements. Major overhauls are carried out within the tractor repair shop, but repairs which do not require complete dismantling of equipment and which can be conveniently made there are done in the field. In some work weeks, however, and on emergency occasions during the crushing season when there is insufficient manpower available from the

machine and welding shops, he works in the mill to assist in making repairs. During the off season he spends all of his time overhauling tractors and field implements which are brought in from the field and completely overhauled. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

71. Damaso Claunan (Garage Employee)—He works exclusively in repairing and maintaining automobiles and trucks used throughout the plantation operations. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

72. Antone Robello (Employee Engaged in Servicing Field Equipment)—He delivers gasoline, fuel oil, lubricants and water to plantation field equipment and assists in servicing such equipment. He works out of the plantation garage. His work is the same during the off season. In [51] going to and from the fields he travels over plantation field roads and public highways which run through some plantation areas. He works under the general supervision of the Cane Processing Superintendent.

73. Manuel Damas (Service Station Employee)—He dispenses gasoline, diesel oil and lubricants for all plaintiff's cars and trucks and fuel oil for plantation bath houses at the plantation service station. He also dispenses fuel oil and gasoline to service trucks which in turn supply plantation tractors and caneloaders. He handles no grease jobs or other

such work. His work is the same during the off season. All of his work is performed at the service station which is located in the plantation buildings and yard area on the plantation. He works under the general supervision of the Warehouse Superintendent.

74. Keichi Kamiyama (Electric Shop Employee) —He is engaged in electrical service and repair work. The building in which or from which he works is known as the electric shop and is situated in the plantation buildings and yard area as shown on Exhibit "F". In some work weeks he is engaged exclusively in repairing and servicing electrical equipment situated and used in the plantation sugar mill in connection with the processing of cane into sugar. In other work weeks he is engaged exclusively in repairing and servicing power lines which carry power from the plantation's power house and substation to its electrical irrigation pumps, and also in repairing and servicing such pumps. In some work weeks he is engaged exclusively in repairing and servicing electrical motors used to repair tractors in the tractor repair shop. In still other work weeks he is engaged exclusively in repairing and servicing power transmission [52] lines of the plaintiff which furnish light and power to plantation buildings, motors and dwellings and some non-plantation buildings and dwellings. He also installs household electrical equipment. In still other work weeks he does each of the things which are enumerated above in the same work week. His duties during both the crushing and off seasons are the

same. All of his work is performed on the plantation. He works under the general supervision of the Cane Processing Superintendent.

75. Yoshiji Yamada (Carpenter Shop Employee)—He works as a carpenter in repairing plantation railroad bridges and flumes, constructing and repairing plantation houses, repairing all plantation buildings and performing miscellaneous carpenter shop jobs and mill carpentry. Also he does construction and repair work on steel and concrete pipelines and siphons used in connection with the irrigation and water supply systems. He may go into the mill at any time to construct scaffolding necessary to do emergency repair work. His work is the same in the off season. All of his work is performed on the plantation. He is under the general supervision of the Construction Superintendent.

76. Edwin Mori (Carpenter Shop Employee)—He is engaged in performing carpentry and related repair work on railroad cars. Upon occasion he may assist in keeping office records in connection with the repair and maintenance of such railroad cars. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Construction Superintendent.

77. Genjiro Hironaka (Carpenter Shop Employee)—He works exclusively in the carpenter shop. Most of his work is performed in connection with the care and maintenance [53] of shop tools, machinery and equipment. He also repairs plantation equipment, makes scrapers used for cleaning

of centrifugals, conveyor slats used in mill conveyors, and push poles for unloading cane cars, and repairs wood on all station wagons and trucks. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Construction Superintendent.

78. Jiro Sakai (Paint Shop Employee)—He works as a painter exclusively. In most work weeks he is engaged exclusively in painting plantation houses. In some work weeks, however, he works exclusively in connection with the painting of office buildings, the plantation gymnasium and club house and other plantation buildings exclusive of the mill. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Construction Superintendent.

79. Margaret Fujiwara (Laboratory Employee)—She makes daily analyses of sugar juice and syrups; determines hydrogen ion, density, and salt concentrates of mill boiler water, steam pump boiler water and locomotive boiler water for purposes of maintaining proper mill, pump and boiler water purities while cane is being processed or steam pumps operated. She also types reports and does laboratory office clerical work. She assists in making nitrogen and moisture analysis of cane leaf blades and analysis of total sugars in cane leaf sheaths. During the off season she does clerical work for the general supplies warehouse which handles storage of much of the plantation supplies and materials,

including supplies and materials for the mill, shops, field, plantation houses and administrative offices. She also recharges fire [54] extinguishers as required during the crushing season. All of her work is performed in the laboratory or general supplies warehouse, (except to obtain boiler water samples in the fire room each day), both of which are located in the plantation buildings and yard area as shown on Exhibit "F". She works under the general supervision of the Cane Processing Superintendent except during the off season when she is under the Warehouse Superintendent.

80. Louis Pacheco (Employee Engaged in Cane Leaf Sampling)—He collects daily samples of cane leaves from various fields on the plantation and prepares them for foliar chemical analysis in the plantation laboratory for the purpose of determining the plant food requirements and plant food status of each field of sugar cane on the plantation. After preparing the samples for analysis by an assigned technician, he returns to the main administrative office where he is engaged in clerical work pertaining to the assembly of laboratory information and its correlation with other growth factors and data which will permit the maintenance of a graphic log of all factors of weather, irrigation, and fertilization which might affect the growth and production of sugar cane. He does some of the simple laboratory work. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

81. Yukishige Tsutsui (Concrete Products Plant Employee)—He works in the concrete products plant located near the plantation buildings and yard area, where he assembles forms, pours concrete, drives a finger-lift in connection with the making of concrete flumes, pipes, house foundation blocks, flume footings, side walk blocks, and [55] other concrete products which are used by the plaintiff in its fields or villages. His work is the same in the off season. All of his work is performed on the plantation. He works under the general supervision of the Construction Superintendent.

82. Yack Chun Lee (General Supplies Warehouse and Heavy Supplies Warehouse Employee)—He is employed in the general supplies warehouse situated about 100 feet from the mill. He checks and keeps records on incoming materials and supplies. He keeps records on warehouse inventory. Occasionally he checks out merchandise to mill, field and shops. He prepares some order lists for new materials and supplies. Upon occasion he will also unpack supplies and place same in storage in a warehouse which is in a building adjoining the general supplies warehouse. His work is the same the year around. All of his work is performed on the plantation. He works under the general supervision of the Warehouse Superintendent.

83. Eiko Sakaguchi (Clerical Employee)—She keeps all records for all construction work performed on cane cars, houses, mill and other plantation buildings and keeps the time of all men in the Construction Department, keeps the records of all

products made at the concrete products plant, keeps an inventory of concrete products on hand, and makes out monthly reports for the Department. She records all work orders and keeps records of all interdepartmental jobs. She does general office work. All her work is done in the headquarters office of the Construction Department situated in the carpenter shop located in the plantation buildings and yard area. Her duties are the same during the off season. All her work is performed on the plantation. She works [56] under the general supervision of the Construction Superintendent.

84. Moses Fernandez (Village Cleaner)—In most work weeks he is engaged exclusively in sweeping up leaves, rubbish and trash in plantation villages. In other work weeks, in addition to the above, he may work in the fields keeping main ditches free from weeds. His work is the same during the off season. All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

85. Toshio Kashiwabara (Plumbing Employee)—He constructs and repairs all plumbing installations of the plantation—including plumbing for domestic sewer and domestic water supply systems, houses, mill, and other plantation buildings having toilets and wash room facilities. In many work weeks he is engaged exclusively in constructing and repairing plumbing installations for plantation houses and for the water and sewerage systems servicing such houses. His work is the same during the off season. All of his work is performed on the

plantation. He works under the general supervision of the Construction Superintendent.

VII.

PRAYER

Wherefore plaintiff respectively prays that it may be declared, ordered, adjudged and decreed as follows:

(a) That the employee defendants named in paragraphs 38 to 85 hereof and performing the work described in such paragraphs and all other employees of the plaintiff engaged in work similar to such described work [57] are employees “employed in agriculture” as the term “agriculture” is defined in Section 3(f) of the Act and that, therefore, all of said employees are exempt from the overtime provisions of the Act pursuant to the provisions of Section 13(a)(6) thereof; or

(b) If the Court finds that any of said employees referred to in (a) of this prayer is not so “employed in agriculture,” that such employee is engaged in a place of employment where his employer (the plaintiff) is engaged in the “processing of . . . sugarcane . . . into sugar (but not refined sugar) or into syrup . . .” and that, therefore, such employee is exempt from the overtime provisions of the Act pursuant to the provisions of Section 7(c) thereof; and

(c) That the employee defendants, Cornelio Asuncion, Jiro Sakai, Moses Fernandez, and Toshio Kashiwabara, named in paragraphs 48, 78, 84, and 85 hereof, when they are engaged in cutting fire

wood for use as fuel by plaintiff's employees living in the plantation villages, pruning shade trees, cleaning plantation villages, repairing and painting houses, gymnasium and club house in the plantation villages and constructing and repairing plumbing installations for houses in the plantation villages and for the water and sewerage systems servicing such houses, [58] and all other employees of plaintiff when engaged in performing similar work are not "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7(a) of the Act and therefore are not subject to the Act, irrespective of whether said employees of plaintiff are exempt from the overtime provisions of the Act pursuant to the provisions of Section 13(a)(6) or of Section 7(c) thereof.

Plaintiff further prays for such other relief as to the court may seem just and proper.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

EXHIBIT "B"

Official

AGREEMENT

This Agreement by and between,
hereinafter called the "Company," and the
....., hereinafter called the "Union,"

Witnesseth:

Whereas, more than a majority of the employees
of the Company under and subject to this agree-
ment have associated themselves together in the
Union and have designated the Union as their sole
and exclusive representative for the purpose of col-
lective bargaining with the Company and,

Whereas, the Company has heretofore recognized
the Union for the purpose of collective bargaining
on behalf of the said employees under and subject
to this agreement, now, therefore, it is agreed as
follows:

SECTION 1

Duration of Agreement

Except as otherwise provided herein, this agree-
ment shall become effective November 19, 1946, and
shall remain in effect until August 31, 1948. It
shall be deemed renewed thereafter from year to
year unless either party hereto gives written notice
to the other party hereto of its desire to amend,
modify or terminate the same, which notice shall
be served not more than seventy-five (75) days nor
less than forty-five (45) days prior to said expira-

Exhibit "B"—(Continued)

tion date, in which event negotiations shall begin within fifteen (15) days from date of notice. This agreement is further subject to reopening by either party solely on the question of wage adjustments upward or downward once between August 1, 1947, and September 30, 1947, inclusive, on thirty (30) days' written notice by either party, and further subject to reopening on the questions of wages, classifications, or hours once between February 1, 1948, and March 31, 1948, [61] on thirty (30) days' written notice by either party. In the event these interim reopening are exercised, negotiations shall commence within ten (10) days from date of notice. In the event of such reopening and failure to agree the parties shall be free to strike or lockout, but solely on the questions of wages or wages, classifications or hours, depending upon the particular reopening. Otherwise, all provisions of Section 14 shall remain in full force and effect.

Notices served under this section shall be accompanied by the proposals of the notifying party.

SECTION 2

Agreement May Not Be Amended Except by
Written Document

The parties realize that not infrequently, after agreements similar in part to this agreement have been executed one party thereto will contend that the other party has at some time during the term of the agreement orally agreed to amend, modify,

Exhibit "B"—(Continued)

change, alter, or waive one or more provisions of the agreement, or, that by the action or inaction of such other party, the agreement has been amended, modified, changed or altered in some respect. With this realization in mind and in order to prevent such contention being made by either party hereto, insofar as this agreement is concerned, the parties have agreed and do hereby agree that no provision or term of this agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto.

SECTION 3

Employee Coverage

The only employees covered by this agreement are those employees of the Company in Units No. 1 and 2 while employed in the jobs, the holders of which were eligible to vote in the election conducted by the National Labor Relations Board, and those agricultural employees in Unit No. 3 while employed in the jobs filled by persons whose names appeared on the agreed cross check lists of employees, excluding in every instance, however, those employees employed in the jobs the holders of which were not permitted to vote in said election and all employees whose names did not appear on the agreed cross check list and all employees having the right [62] to hire, fire, promote, demote, transfer, discipline or change the status or wage rate of

Exhibit "B"—(Continued)

any employee or effectively recommend such action and further excluding minors who have not reached their 16th birthday, and students.

It is understood and agreed that there may be some change in the coverage with respect to employees who have been heretofore excluded as supervisory or who, although supervisory, have been included, such changes to be as the result of agreements based upon the application of the attached Exhibit "A."

SECTION 4

Discrimination

(a) The Company will not attempt to intimidate or coerce any employee into refusing to join the Union and will not discriminate against any employee because of his membership in the Union or for legitimate Union activity. Such activity, however, shall not interfere with the Company's operations; nor be conducted during working hours (unless expressly provided for by this agreement).

(b) The Union agrees for itself and its members that neither it, its representatives or members will attempt to intimidate or coerce any employee of the Company for the purpose of compelling any employee to join the Union.

(c) In accord with the policies of the Company and of the Union (as contained in its Constitution) it is agreed that neither party will discriminate against any employee on the basis of race, creed

Exhibit "B"—(Continued)

or color. The Union undertakes to see that the right of employees to submit questions arising under this paragraph to the grievance machinery of the agreement shall be so exercised and limited as to assure that it will not be the basis for creation of inter-racial problems or dissension.

(d) The Company will not discriminate against the Union or its members by action based upon favoritism toward non-union employees in the granting of premium rates, allocation of housing, promotions, transfers, the application of the classification system, or the conferring of special privileges. [63]

(e) Any claim by the Union that action of a non-union employee is disrupting the harmonious working relations in the plantation or is intended to undermine the Union may be brought to the attention of management by the Union for review, but shall not be subject to the grievance machinery or arbitration.

SECTION 5

Seniority

In making lay-offs and recalls after lay-offs and in making promotions or transfers, employees' length of continuous service will govern where all other relevant factors (such as merit, experience, knowledge, ability, physical and mental fitness) are relatively equal.

When job vacancies occur which are to be filled

Exhibit "B"—(Continued)

by promotion or transfer of employees within the bargaining units, notice of such job openings will be posted on the company bulletin board seventy-two (72) hours prior to their being filled on a regular basis in order to afford employees who desire to be considered therefor an opportunity to signify their interest at the place designated and on the forms provided by the Company within such seventy-two (72) hour period.

All eligible employees of the Company will be considered in filling such job openings, but any employee who fails to file for the opening may not claim to be aggrieved when the opening is filled.

Any grievance arising over transfer or promotion shall be subject to the first four steps of the grievance procedure set forth in Section 19 of this agreement, but it shall not be subject to arbitration if it is not disposed of at Step 4 and the decision and judgment of management shall be final.

This principle of seniority shall not apply to any employee until he shall have completed six (6) months of continuous service with the Company.

Continuous service shall be considered broken by (a) discharge, (b) resignation, or (c) six (6) consecutive months of unemployment. The six (6) months' period may be extended by mutual agreement. [64]

Exhibit "B"—(Continued)

SECTION 6

Wages and Classification

The job classification plan and wage schedule (Exhibit C) become effective November 19, 1946. All employees covered by this agreement will be classified in accordance with the provisions outlined in the Job Classification Manual. All employees' rates will be brought to the rate of their respective grade levels but in no case will an employee receive an increase of less than 25 cents per hour over his previous rate, subject, however, to the provisions of Section 7.

Employees paid on piece-work or production incentive basis will have their pay increased by 25 cents per hour for each straight time hour worked and by 37½ cents per hour for each overtime hour worked subject, however, to the provisions of Section 7. If the increases are worked into piece rates the conversion will be subject to Union approval.

Rates of pay of handicapped and superannuated employees will be established individually provided the parties hereto can come to a mutual agreement. Failing mutual agreement such employees may be dismissed. Such employees, if retained, shall be increased as of November 19 in an amount not less than 25 cents per hour.

After the effective date of the job classification plan and after wage increases as herein provided for, no further wage increases shall be made or

Exhibit "B"—(Continued)

otherwise effected, except within the provisions of the job classification plan, or as provided under Section 1 hereof.

Production incentive and piece-work plans of compensation will be maintained. The Company may, however, develop alternative production incentive and piece-work plans during the life of this Agreement, with the understanding that if such plans are equitable and better adapted to operating conditions they will become operative if mutually satisfactory.

Grievances over Classification. If any employee or if the Union alleges that an employee is improperly classified by claiming that such employee by reason of his duties is, in fact, performing assignments other than the job classification to which he is allocated, such allegation shall be subject to final determination through the grievance procedure provided in Section 19 of this Agreement. [65]

No allegation, however, that any classified job has been improperly allocated, or that such classified jobs should be allocated to different labor grades than that assigned and described in the Job Classification Manual, shall be subject to the grievance procedure under this agreement. It is also agreed that the job classification system as contained in the Manual shall not be subject to change through reference to the grievance procedure or arbitration.

Exhibit "B"—(Continued)

SECTION 7

Conversion of Perquisites and
Minimum Guarantee

Simultaneously with the installation of new wage rates as provided in Section 6, all perquisites will be eliminated and employees will be charged for rent and other perquisites in accordance with the attached Exhibit "E." Each individual who is paying rent will have his monthly rental divided by 208 and if the resulting amount, subtracted from his per-hour increase, leaves him less than the following guarantee, his rate will be increased by the amount of the difference.

Status	Minimum Net Guarantee
Single.....	19.0 cents per hours
Married.....	20.0
“ 1 Dependent.....	21.0
“ 2 Dependents.....	22.0
“ 3 Dependents.....	22.0
“ 4 Dependents.....	23.0
“ 5 or more Dependents.....	23.5

Dependents shall be defined to mean the following persons living on the plantation: (1) children under sixteen (16) years of age, (2) children under eighteen (18) years of age who are attending school, and (3) aged and infirm persons who are recognized as dependents by the plantation.

The family and dwelling status and regular wage rate of each employee will be determined as of November 19, 1946, and his regular rate will be adjusted as of such date to reflect the guarantee so

Exhibit "B"—(Continued)

established. Subsequent changes in his family or dwelling status will not affect his wage rate. [66] New Hires will not receive the minimum guarantee but will be hired at the classified rate.

In determining the rental amount for the purpose of applying the minimum guarantee unmarried persons renting separate quarters will be charged rentals applicable to such quarters.

In the case of family dwellings occupied by more than one plantation wage earner, the rental of such dwelling for the purpose of the above computation only will be apportioned equally among such regular wage earners.

In the case where a house is occupied both by plantation wage earners and one or more non-plantation wage earners who are paying rent to the plantation for such occupancy, the amount of the house rent to be charged the plantation wage earner for the purpose of the above computation only shall be reduced by the amount of the former rent collected from the non-plantation workers.

It is understood that the rentals for family dwellings are subject to possible adjustment up or down on the basis of the conclusions and recommendations of the appraiser or appraisers in accordance with Exhibit F. Pending such adjustment, the rental charge to any employees affected by the minimum net guarantee will be temporarily fixed at a maximum of 10 per cent below the appropriate rent figures shown on the rental schedule and the

Exhibit "B"—(Continued)

employee's premium rate fixed accordingly, subject to adjustment on the final determination of rentals by the appraiser at which time both the rent and wage rate will be adjusted in accordance with said determination.

SECTION 8

(a) Any employee subject to this agreement may be temporarily transferred to another classification or may be used for the relief of employees under other classifications. If so transferred to a lower rated classification, whether at the beginning of or during a shift, he shall receive his regular classification rate or personalized rate whichever is higher. If so transferred to a higher rated classification, whether at the beginning of or during a shift, he shall receive the rate applicable to said higher [67] classification while so transferred commencing with the nearest time interval customarily used by the Company for timekeeping purposes for at least the balance of the shift.

A transfer made for the convenience of a transferred employee (except employees temporarily incapacitated by reason of an industrial accident) shall not be deemed a temporary transfer irrespective of the duration of the transfer.

The Company agrees that except in the case of emergencies every effort will be made to administer the provisions of this section in such manner that demands made upon transferred employees for

Exhibit "B"—(Continued)

physical effort will not be excessive in comparison with the usual duties.

(b) When an employee in a bargaining unit is temporarily transferred to a higher rated job which is not included in a unit, the question arises as to the wage rate the employee should receive while holding the job to which temporarily transferred. To determine the wage rate the Company will take into consideration the following:

(1) If it is ascertained that the transferred employee, in fact, assumes and exercises all of the duties, authority and responsibility of the job, he will be paid the established minimum wage for the job. The transferred employee is not entitled to receive the personalized rate of the permanent employee which is the result of length of service and merit increases.

(2) If it is ascertained that the transferred employee assumes only part of the responsibilities, duties, authority and responsibilities of the job, Management after consideration of all factors will determine a fair wage rate for the temporary assignment, which shall not be less than 12.5 cents per hour above his regular rate, but in no event higher than the established minimum job rate.

The provisions of subsection (b) shall not be deemed to extend in any way the coverage of this agreement to jobs not now covered or the right of the Union to represent in collective bargaining units as provided in Section 3 above. [68]

Exhibit "B"—(Continued)

SECTION 9

Hours

(a) The work day for calculating overtime shall be twenty-four (24) consecutive hours and the work week seven (7) consecutive work days. The regularly scheduled work days and work week will be conspicuously posted. Such scheduled work days shall provide for eight (8) hour shifts within a maximum spread of nine (9) hours except on operations requiring a larger spread, in which case there will be a maximum spread of fourteen (14) consecutive hours. Questions as to which jobs shall be so excluded shall be left to the plantation manager and local union for settlement. Emergencies such as failure of shift relief to report will be excluded. The seventh day of such scheduled work week shall be defined as the employee's weekly scheduled day of rest.

(b) Work performed by any employee in excess of eight (8) hours in any one work day, except when changing shifts, shall constitute overtime, but only if the work is performed at the request, or on the order of the Management.

(c) Work performed by any employee in excess of forty-eight (48) straight time hours in any one week shall constitute overtime, provided, however, that during the off-season work performed by employees under and subject to the maximum hour provisions of the Fair Labor Standards Act in excess of forty (40) straight time hours in any one

Exhibit "B"—(Continued)

week shall constitute overtime. No overtime shall be paid unless the work is performed at the request or on the order of the Management. "Off-season" is defined as that period during which the factory is shut down for its annual overhaul. An off-season shall begin on the work day immediately following the work day in which the last sugar is bagged or placed in bulk storage and shall end on the day on which grinding is resumed. Not later than the day on which the off-season begins, the Company shall post on the bulletin board a notice announcing the date the off-season begins; and not later than the day on which the off-season ends, the Company shall post on the bulletin board the date on which the off-season ends. [69]

(d) Work performed by an employee on his weekly scheduled day of rest shall constitute overtime, but only if the work is performed at the request or on the order of the Management.

(e) Except in cases of emergency such as fire, flood, disaster or failure of replacement to relieve an employee, no employee shall be required to work more than fourteen (14) continuous hours without a rest period of eight (8) hours. Continuity shall not be deemed to be broken by meal periods.

(f) An employee reporting for work at his regularly scheduled starting time shall be guaranteed a minimum of two (2) hours' work or two (2) hours' pay at the then prevailing basic straight-

Exhibit "B"—(Continued)

time rate in lieu thereof, unless such employee had been previously told not to report.

The attached Exhibit "D" sets forth the Industry statement of policy regarding hours worked.

SECTION 10

Overtime

Overtime work performed by any employee shall be paid for at one and one-half ($1\frac{1}{2}$) times the employee's regular rate of pay.

Employees shall receive credit for weekly overtime purposes of eight (8) hours on each of the holidays specified in Section 11 regardless of whether work is performed on that date or not.

SECTION 11

Holidays

Employees shall receive one and one-half times their regular basic straight time rate for work performed on any of the following days, provided, however, that employer may designate the twenty-four hour period which shall be considered as the holiday for overtime purposes but no less than sixteen (16) hours of said twenty-four (24) hour period must coincide with the calendar holiday:

New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, General Election Day, V-J Day, or an agreed-upon alternative, Thanksgiving Day, Christmas Day.

If any of the above mentioned holidays fall on Sunday or the employee's regularly scheduled day

Exhibit "B"—(Continued)

of rest, the following work day shall be considered as the holiday for the purpose of this section. [70]

SECTION 12

Vacations

Every employee covered by this agreement who on July 1 or employment anniversary date shall have worked 265 days in the preceding 12 months' period shall be entitled to a vacation of one calendar week (6 days) with pay computed on the basis of his then prevailing straight time hourly rate if on day work, and his average straight time earnings for such period if on piece work. For each additional unit of six work days worked in excess of 265 work days in the qualifying period every employee covered thereby shall receive an additional day of vacation provided, however, that no more than two calendar weeks (12 days) of vacation shall be allowed in any one calendar year. Vacation days shall be consecutive work days.

In computing vacation credit accrual dates may be extended by seventy-nine (79) days to permit employees an equal opportunity to earn vacations for the period 1946-1947 and where this applies no credit will be given for days worked between August 31 and November 19, 1946.

Employees shall receive credit for purposes of computing their vacations for

1. Lost time due to illness up to a maximum of 12 work days when excused by the plantation.

Exhibit "B"—(Continued)

2. Lost time due to industrial accidents up to a maximum of 30 work days,
3. Authorized vacation days taken during the year,
4. Regularly scheduled work days if no work is offered on such days,
5. Holidays listed in Section 11, and
6. During the "off-season" if the Company does not offer 6 days work a week credit shall be given for the days when no work is offered. (In no event shall credit be given for the employee's regularly scheduled day of rest unless worked.)

"Work day" as used in this section shall constitute the number of hours of work required by the Company in the particular task in which the employee is engaged.

The Company shall have the sole and exclusive right to determine the period during which any employee shall take his vacation but the expressed [71] preferences of employees will be given due consideration. The Company will notify the employee two weeks in advance of the date upon which his vacation starts.

Vacations shall not be cumulative.

SECTION 13

Emergency Call-Out

A minimum of two (2) hours' pay at the prevailing rate will be provided for an employee called to perform emergency work. If the emergency work is performed in less than two (2) hours, it shall be

Exhibit "B"—(Continued)

the employee's prerogative to go home after its completion and be paid the two hours' pay, or the Company will provide a total of four (4) hours' work if the employee decides to continue working.

SECTION 14

Continuous and Uninterrupted Service

It is expressly understood and agreed that during the term of this agreement, any past, existing or future custom or practice of the Company or of the Union to the contrary notwithstanding, there shall be no lockout by the Company, nor any strike, sit-down, refusal to work, stoppage of work, slow-down, retarding of production or picketing of the Company on the part of the Union or its representatives, or on the part of any employee covered by the terms of this agreement.

The presentation of grievances during working hours as authorized pursuant to Section 19 of the contract shall not constitute violation of this section.

SECTION 15

Deduction of Union Dues from Wages

The Company agrees to deduct from the wages of such of its employees as shall so request in writing all dues hereafter becoming due from such employees to the Union, not to exceed, however, the sum of Three Dollars (\$3.00) per month and an initiation fee not to exceed Ten Dollars (\$10.00), and to transmit the money so deducted to the Union as hereinafter provided. Any employee desiring to

Exhibit "B"—(Continued)

have his Union dues deducted may sign a proper form requesting such deduction from his pay and such request for deduction will, if voluntarily made, upon filing with the Company, be honored for the [72] duration of original term of this agreement or the assignment whichever terminates first. Such deduction shall be made not oftener than once a month.

In case any employee does not have the total amount of any deduction, or more, due him on any payroll from which deductions are made in respect of other such employees, the deduction shall be made out of the next succeeding payroll upon which such employee has the total amount, or more, due. It is agreed that authorized deductions for government taxes and for the purpose of paying indebtedness to the Company, garnishments and deductions required by law to be made by the Company shall have priority over deductions for Union dues.

Dues deduction assignment on file prior to August 31, 1946, will be honored (in the amount specified thereon) for the period of the agreement provided the employees who made such assignments have not signified their intention to the contrary pursuant to notice posted in the form agreed upon. It is understood that employees failing to report to work during the period prescribed in the notice by reason of bona fide illness or other reasons beyond their control shall have such additional period for revocation as is necessary and reasonable.

The total amount of any dues deduction and

Exhibit "B"—(Continued)

initiation fees shall be promptly transmitted by the Company to the Union by check drawn to the order of I.L.W.U., Local...., Unit.... Upon the issue of such check and the transmission of same to..... or his successor of said Union, all responsibility on the part of the Company shall cease with respect to any amount so deducted. The Company shall not be bound in any manner to see to the application of the proceeds of any such check, nor to investigate the authority of any designated officer of said Union to sign any request, to accept any such check, or to collect the same. The Union hereby undertakes to indemnify and hold blameless the Company from any claim that may be made upon it for or on account of any such deduction from the wages of any employee.

SECTION 16

Right of Access to the Company's Premises

A duly certified representative of the Union shall be permitted on the [73] Company's premises for the purposes of investigating grievances that have arisen and ascertaining whether or not this agreement is being observed. Such Union representative shall see the Manager or any one of three other representatives to be designated by the Company, any one of whom shall permit the Union representative to enter the Company's premises; provided, however, that the Company may send a representative to accompany the Union representative, but the Union's representative in investigating any griev-

Exhibit "B"—(Continued)

ance shall be entitled to interview privately any employee covered hereby. It is further provided that such permission to enter the Company's premises shall be exercised reasonably and shall not interfere with the conduct of the Company's operations.

SECTION 17

Leave of Absence for Union Business

Any employe elected to an office in the Union which requires full time in the discharge of its duties shall be given a leave of absence of not more than one year without pay and without loss of seniority provided, however, that no more than three such employees shall be on leave of absence at one time and that no more than one employee shall be on leave of absence at one time from any one operation of the Company. Arrangements can be made by mutual consent for temporary leave of absence without pay for union business under circumstances that will not interfere with the Company's operation.

It is understood that arrangements for temporary leaves will be made for attendance at the regular Territorial I.L.W.U., conventions, and the International Convention of the I.L.W.U., provided ample notice is given and satisfactory provision can be made for operations during the employees' absence. It is further understood that requests for such leaves will be limited to not more than three such conventions in a year and that the number of dele-

Exhibit "B"—(Continued)

gates will not exceed one for each 100 employees up to 500, one for each additional 250 up to 1000, and one per 500 above.

SECTION 18

Discharge

[74]

(a) Employees shall be subject to discipline or discharge by the Company for insubordination, pilferage, drunkenness, incompetence, failure to perform the work as required, violation of the terms of this agreement or failure to observe safety rules and regulations, and the Company's house rules which shall be conspicuously posted. Any discharged employee shall, upon request, be furnished the reason for his discharge in writing. Any employee who has not had six (6) months of service with the Company may be summarily discharged.

(b) The Company agrees to notify the local union representatives of proposed changes in house rules prior to the posting of such new rules and to discuss such changes with the union representatives prior to their application, it being understood, however, that in all cases the final decision shall be left to Management.

It is also understood that the Company will undertake a review of existing house rules with a view to eliminating those that are obsolete or inapplicable. Such reviews will be discussed with employee representatives with the understanding that in all cases Management's decision shall be final.

Exhibit "B"—(Continued)

In the event of conflict between the house rules and provisions of this agreement, the agreement will prevail.

SECTION 19

Grievance Procedure

When any employee covered by the terms of this agreement, or the Union believes that the Company has violated the express terms of this agreement and that by reason of such violation his or its rights arising out of such agreement have been adversely affected, he or it, as the case may be, shall be required to follow the procedure hereinafter set forth in presenting the grievance.

Step 1. The grievance may be presented by the employee concerned to his immediate supervisor or it may be presented by a representative of the Union acting in the employee's behalf to the employee's immediate supervisor who will give his answer within forty-eight (48) hours following the presentation of the grievance. At this step in the procedure, the grievance may be presented either orally or in writing and in the discretion of the [75] employee's immediate supervisor may be answered either orally or in writing. The Company promptly upon execution of this agreement, will provide the Union with a list of the individuals who will represent Management at this step in the grievance procedure, and will thereafter promptly advise the Union regarding any changes in connection therewith.

Exhibit "B"—(Continued)

Step 2. If the grievance is not disposed of in the first step, the complainant employee or a representative of the Union acting in his behalf may present the grievance to the employee's..... Division or Department Head who will give his answer either orally or in writing within seventy-two (72) hours. At this step in the procedure, the grievance may be submitted either orally or in writing. The Company, promptly upon execution of this agreement, will provide the Union with a list of the individuals who will represent Management at this step in the grievance procedure, and will thereafter promptly advise the Union regarding any changes in connection therewith.

Step 3. If the grievance is not disposed of in the second step, the complainant employee may either present the grievance directly or through the Executive Committee of the Union acting in his behalf to the Industrial Relations Committee of the Company. At this step in the procedure, the grievance must be submitted in writing and the Industrial Relations Committee will answer the grievance in writing within one week following presentation of the written grievance to the Committee. The Company promptly upon execution of this agreement will inform the Union of the composition of the Industrial Relations Committee and will keep it informed of any changes therein.

Step 4. If the grievance is not disposed of in step three, it may be taken up in writing either by the employee directly or through the Executive

Exhibit "B"—(Continued)

Committee of the Union acting in his behalf at a meeting with the manager or his representative. Meetings with the manager shall be scheduled when necessary to resolve grievances appealed to that step of the procedure. After notification is received, meetings shall be held within one week. The Manager's written answer to written grievances shall be given within one week following the meeting.

Step 5. Any dispute involving the meaning, interpretation or application of the terms of this agreement which is not disposed of in Step 4 may be submitted to the Arbitrator in accordance with Section 20.

The Union promptly upon execution of this agreement will provide the Company with a written list of its representatives, who will be empowered to act in an employee's behalf in presenting or investigating grievances in accordance with the procedure set forth herein, and will thereafter promptly advise the Company of any changes that are made.

International Union representatives may be present in meetings of the third step and succeeding steps of the grievance procedure.

The Company will not be required to consider any grievance involving a single incident which has not been presented to the Company within fourteen (14) days following the date of the alleged occurrence of the incident. The Company will not be required to consider any grievance involving an alleged continuing situation or alleged series of re-

Exhibit "B"—(Continued)

peated identical incidents which have not been presented to the Company within fourteen (14) days following the date on which the situation or incident last occurred.

Failure of the Company to answer a written grievance within the time limits prescribed in each step of the grievance procedure shall permit reference of the case to the succeeding step of the procedure following the expiration of the time limits.

The Company shall not be required to consider any grievance case in which the employee or the Union acting in his behalf does not refer the case to the succeeding step of the grievance procedure within fifteen (15) days following the delivery of written decisions by the Company in Step 3 or in succeeding steps of the grievance procedure.

Addition to Grievance Clause. In the absence of authorization to the contrary grievances are to be presented and considered outside of working hours. It is understood, however, that where reasonable and where possible without undue loss of productive time and interference with operations authority will be extended to present grievances within working hours. [77]

SECTION 20

Procedure Before Arbitrator

.....,

, are hereby appointed as a panel
 of arbitrators. In the event a dispute arises con-

Exhibit "B"—(Continued)

cerning the application or interpretation of the terms of this agreement which cannot be settled pursuant to the provisions of Section 19, the dispute shall be submitted to one of the arbitrators who shall be chosen as follows: Each party may strike two names from the panel and the remaining arbitrator shall serve in the case. All decisions of the Arbitrator shall be limited expressly to the terms and provisions of this agreement, and in no event may the terms and provisions of this agreement be altered, amended, or modified by the Arbitrator. The Arbitrator shall receive for his services such remuneration as, from time to time, shall be acceptable to him and agreed upon by the parties hereto. All decisions of the Arbitrator shall be in writing and a copy thereof shall be submitted to each of the parties hereto. All fees and expenses of the Arbitrator shall be borne equally by the Union and the Company. Each party shall bear the expenses of the presentation of its own case.

The complainant in every hearing before the Arbitrator shall have the burden of proving his case by a preponderance of the evidence, and, in general, judicial rules of procedure shall be followed at such hearings but the Arbitrator need not follow the technical rules of evidence prevailing in a court of law or equity.

SECTION 21

Sick Leave

Effective on the date of the conversion of perquisites in accordance with Section 7, the following

Exhibit "B"—(Continued)

sick benefit allowance plan will be put into effect. Every employee covered by this agreement who has been in the continuous employment of the Company shall receive benefit payments in accordance with the following schedule:

For disability lasting more than three work days resulting from sickness or from accidents not incurred in the actual performance of the duties [78] of an employee's occupation, hourly rated employees shall be entitled to benefits payable beginning with the fourth day of disability, in accordance with the following plan, provided, however, that no payment will be made for days which are not the employee's regular work days:

Years of Service	Total Days of Benefit per Year at Two-thirds Pay
1 year but less than 2 years.....	6
2 years but less than 3 years.....	12
3 years but less than 4 years.....	18
4 years but less than 5 years.....	24
5 years or more.....	30

Unused benefit allowances will not accumulate from year to year.

All employees will be credited with past service on the date this plan is initiated.

In the event the total benefits for the year are not used up in one period of disability, the balance may be applied in case of a subsequent disability within the year, subject to the same waiting period and other conditions. No benefit shall be paid for disability directly or indirectly due to (1) use of stimulants, drugs, or narcotics, (2) unlawful acts, or (3) willful intent of the employee to injure himself or another.

Exhibit "B"—(Continued)

Employees shall promptly notify their supervisors and the doctor or nurse employed by or designated by the Company of any sickness or disability for which allowances may be claimed.

In each case of disabling illness or accident, the Company reserves the right to have a doctor or nurse make such examinations from time to time as may be necessary to ascertain employee's condition, and the opinion of such doctor or nurse shall prevail as to (1) whether the employee is disabled on account of sickness or accident, (2) when he is able to return to work, and (3) duration or degree of disability.

One day's wages shall be calculated on the basis of eight (8) straight time hours multiplied by the employee's classification rate.

SECTION 22

Document Contains Entire Agreement

This document contains the entire agreement of the parties and neither party has made any representations to the other which are not [79] contained herein.

In Witness Whereof, the parties hereto, through their duly authorized representatives, have executed this agreement on the.....day of....., 1946.

.....

Company

By

I.L.W.U. Local..... Unit.....

By [80]

Exhibit "A"—(Attached to Exhibit "B")

COVERAGE

(Tests to be applied plantation by plantation.)

The parties agree to re-examine the exclusion from the units of jobs on the basis that they were supervisory in nature, with a view toward removing discrepancies and excluding on such basis only bona fide supervisors or lunas as defined by the following standards:

To classify an individual as a supervisor he must fulfill the following requirements.

1. Receives a regular monthly salary, with all the privileges and benefits of employees in a salaried status, and whose compensation shall be the equivalent of at least 12.5 cents per hour in excess of the highest classification rate of jobs regularly supervised or in case of supervision of gangs working on group contract incentive plans at least 12.5 cents per hour above the average earnings of the gang; and

2. Has the authority to hire or fire other employees or whose recommendations as to hiring or firing and as to the advancement, promotion or demotion, transfer and reclassification of other employees will be given particular weight; and 3 below.

3. Who is charged with the responsibility for the operation of a department, or a definite sub-division within a department, and for the operation, maintenance and safeguarding of company machinery, equipment and materials under his supervision, and who in the discharge of his responsibility custom-

arily and regularly exercises discretionary powers, but who does not spend more than 20% of his time performing the same work as is performed by those employees under his supervision, and who supervises and directs as part of his duty, the work [81] of all employees in the department, or subdivision thereof, for which operation he is held responsible and spends not more than 20% of his time performing the same work as is performed by those employees under his supervision.

It is recognized that the application of the above standards may mean the exclusion of some jobs now covered as well as the inclusion of jobs now excluded. Employees now receiving monthly salaries will not be converted to hourly rates by reason of their inclusion in the unit.

(These tests shall not be construed to extend the coverage of the contract to any jobs or employees now excluded except those now excluded solely on the basis that they are supervisory and do not meet the above standards. The agreement reached in this document shall not be used to prejudice the position of either party on the interpretation or application of the Hawaii Employment Relations Act or the National Labor Relations Act.) [82]

Exhibit "B"—(Attached to Exhibit "B")

(Exhibit "B" will not be used in the general contract, but there will be a separate exhibit in the contract of Waialua, Ewa, H. C. & S. and Honolulu plantations based upon Exhibit "B" of the memorandum.)

Exhibit "C"—(Attached to Exhibit "B")

INDUSTRY WAGE SCHEDULES

Grade	Classification Schedule Cents per Hour	Revised Schedule Including Wage Increase
1.....	43½	70½
2.....	47	74
3.....	51½	78½
4.....	56	83
5.....	61½	89
6.....	68	96
7.....	75½	104½
8.....	84	114
9.....	94	125
10.....	106	138

Exhibit "D"—(Attached to Exhibit "B")

INDUSTRY STATEMENT OF POLICY
REGARDING HOURS WORKED

Time on each work day shall commence at the time established for the employee's scheduled shift and shall continue until the time fixed for the ending of such shift at the place of work plus any overtime requested by Management; but it shall not include:

(a) Non-working meal periods.

(b) Time between parts of a split shift.

(c) Time elapsing between the end of an employee's regular shift and the starting of overtime work on a succeeding shift when the employee is free to do as he chooses.

(d) Time not worked in excess of "called out" time.

The following cases illustrate time also treated as hours worked:

1. Time during which an employee operates a vehicle pursuant to Company orders for the transportation of other employees or of materials and

ending with its return to the designated place of storage.

2. Time spent by all employees between the moment (a) when materials or tools, not normally retained in the possession of the employees, are picked up, or (b) when work assignments of instructions are issued, and the scheduled starting time at the place of work; provided that all such time occurs within the employer's scheduled work-day.

3. Likewise time at the close of work on the workday between the scheduled finishing time and the time when all instructions are completed and materials and tools (covered in 2 above) are returned to their designated place of storage. [85]

4. Time spent in transportation from one field to another or one job to another during the shift. In this case time for all workers thus transported will be paid for at the classified hourly rate of the job classification on which the employee is working or transferred to whichever is the greater.

Employees shall not be required to assemble for instructions on their own time.

In the matter of providing transportation for workers in the fields back to the assembling points or their homes it shall be the policy of the companies to offer transportation in such a manner that it will not require any worker to wait more than 15 minutes after the end of the regularly scheduled work day before boarding the vehicle. Management will make every effort, barring circumstances beyond its control, to comply with this policy. [86]

Exhibit "E"—(Attached to Exhibit "B")
 INDUSTRY MONTHLY RENTAL RATES OF DWELLINGS ACCORDING
 TO AREA, CLASS AND CONDITION OF BUILDING

	Class 1			Class 2			Class 3		
	A	B	C	A	B	C	A	B	C
500 Sq. Ft. or less.....	\$10.00	\$12.50	\$15.00	\$12.50	\$15.00	\$18.00	\$15.00	\$18.00	\$21.50
600	11.00	14.00	17.00	14.00	17.00	20.50	17.00	20.50	24.50
700	12.00	15.50	19.00	15.50	19.00	23.00	19.00	23.00	27.50
800	13.00	17.00	21.00	17.00	21.00	25.50	21.00	25.50	30.50
900	14.00	18.50	23.00	18.50	23.00	28.00	23.00	28.00	33.50
1000	15.00	20.00	25.00	20.00	25.00	30.50	25.00	30.50	36.50
1100	16.00	21.50	27.00	21.50	27.00	33.00	27.00	33.00	39.50
1200	16.75	22.50	28.50	22.50	28.50	35.00	28.50	35.00	41.75
1300	17.50	23.00	30.00	23.50	30.00	37.00	30.00	37.00	44.00

- A. Rental for houses with floor area falling between the above points will be adjusted to the nearest 25c per month.
 B. This schedule will not apply to future construction. (Maximum rental on Clokele houses now being completed, \$43.50 per month.)
 C. Rental adjustments for improvements or repairs affecting the class, condition or floor area of the house will be made effective on the first of the month following completion of the work.
 D. Floor area is that area expressed in square feet under the roof line of each dwelling including service facilities directly attached to the house or, in an elevated house, the enclosed or concrete area on the ground floor.
 E. Water, when metered, will be charged for at current county rates in effect in the locality. Otherwise a flat rate of \$1.00 per month will be charged to families occupying dwellings up to 1000 square feet in floor area and \$1.50 per month for those from 1001 to 1500 square feet.
 F. Electricity will be purchased by each tenant for his own account from the local public utility where available; otherwise from the plantation at public utility rates.
 G. Fuel will be purchased by each tenant from any sources available to him.

INDUSTRY MONTHLY RENTAL RATES OF BEDROOMS IN SINGLE MEN'S QUARTERS ACCORDING TO HOUSE FLOOR AREA PER BEDROOM, CLASS AND CONDITION OF BUILDING AND PER CAPITA MINIMUM RENTALS

House Floor Area per Bedroom	Class 1			Class 2			Class 3		
	A	B	C	A	B	C	A	B	C
100 Sq. Ft. or less.....	\$ 5.00	\$ 6.75	\$ 8.50	\$ 6.75	\$ 8.50	\$10.50	\$ 8.50	\$10.50	\$12.75
125	5.25	7.25	9.25	7.25	9.25	11.50	9.25	11.50	14.00
175	5.50	7.75	10.00	7.75	10.00	12.50	10.00	12.50	15.25
225	5.75	8.25	10.75	8.25	10.75	13.50	10.75	13.50	16.50
275	6.00	8.75	11.50	8.75	11.50	14.50	11.50	14.50	17.75
325	6.25	9.25	12.25	9.25	12.25	15.50	12.25	15.50	19.00
PER CAPITA MINIMUM RENTALS									
100 Sq. Ft. or less.....	3.00	4.00	5.00	4.00	5.00	6.25	5.00	6.25	7.25
125	3.25	4.25	5.50	4.25	5.50	7.00	5.50	7.00	8.00
175	3.25	4.50	6.00	4.50	6.00	7.75	6.00	7.75	8.75
225	3.50	4.75	6.50	4.75	6.50	8.50	6.50	8.50	9.50
275	3.50	5.00	7.00	5.00	7.00	9.25	7.00	9.25	10.25
325	3.75	5.25	7.50	5.25	7.50	10.00	7.50	10.00	11.00

- A. Rental for bedrooms with house floor area per bedroom falling between the above points will be adjusted to the nearest 25c per month.
- B. This schedule will not apply to future construction.
- C. Rental adjustments for improvements or repairs affecting the class, condition or square foot area of the building will be made effective on the first of the month following completion of the work.
- D. House floor area per bedroom is the total floor area of the house divided by the number of bedrooms in the house.
- E. Water, when metered, will be charged for at current county rates in effect in the locality. Otherwise a flat rate of \$0.50 per month will be charged each single occupant of single men's quarters.
- F. Electricity will be purchased by each tenant for his own account from the local public utility where available; otherwise from the plantation at public utility rates.
- G. Fuel will be purchased by each tenant from any source available at him.

Exhibit "E"—(Continued)

CLASSIFICATION OF DWELLINGS

The following descriptions set forth the types of construction and of the facilities provided:

Class 1. A dwelling constructed of rough merchantable lumber, stud framing, single wall, floors 1x12 inches or 1x6 inches; stock sized or T & G doors; sliding windows; drop cord electrical outlets; toilet, bathing and laundry facilities detached; kitchen with sink and tap may be attached or detached.

Class 2. A dwelling constructed of surfaced lumber; ceiling of Canec, surfaced lumber, or other material; single wall; stock doors, sliding or hung windows; stain or paint outside and inside; drop cord electrical outlets; kitchen, with sink and tap, attached; toilet and bathing facilities and laundry, with laundry trays, detached, sewer or cesspool connections.

Class 3. A dwelling constructed of surfaced lumber; Canec or surfaced lumber ceiling; T & G floors; stock doors; sliding, double hung or casement windows; stain or paint outside and inside; clothes closets; some kitchen cabinet work; floor plugs and outlets for electrical equipment; shower or bathtub, standard flush toilet, lavatory and kitchen sink in the dwelling; individual laundry and laundry trays; sewer or cesspool connections.

All of the houses in each of the categories may not correspond in every detail.

The three classes of physical condition are as follows:

Exhibit "E"—(Continued)

Class A. A dwelling requiring major repairs or thorough renovating or possibly complete replacement.

Class B. A dwelling requiring general, but not major, repairs and painting.

Class C. A dwelling which has been well maintained and repaired, or which has been built, remodeled, or thoroughly renovated within the past five years and well maintained since. [89]

TEMPORARY VOLUNTARY MEDICAL
PLAN

The plan provides that any person who enjoyed medical perquisites on the plantation heretofore is eligible to join and further as a condition of membership in the temporary medical plan, membership fees become effective as of November 19, 1946.

Brief description of medical plan forms:

I. Application for Membership, (Triplicate).

This form, when properly filled out, will provide information to determine the amount of monthly dues.

II. Schedule of Rates and Certificate of Membership.

This form provides the employee with information relative to the rates being charged and also a certificate that the employee has become a member of the plan at the applicable rate.

III. Rejection of Plan by Employee.

Exhibit "E"—(Continued)

This document should be signed by every employee who refuses to join the plan within an allotted time.

Attention is called to the fact that for simplification, all forms are made up for Waialua Agricultural Company, Ltd., and, of course, are sample copies only. It is anticipated that each plantation will reproduce the forms for their own use.

It is understood that a regular Medical plan is to be developed to become effective six months from date of the contract. It will provide similar coverage to the H.M.S.A. Lanai plan and at rates substantially equivalent to those then prevailing under that plan.

The formal Medical plan may be an insured plan, the H.M.S.A. plan, or the temporary plan may be continued, at the option of the plantation. If the temporary plan is continued hospital facilities may be consolidated or transferred. [90]

**TEMPORARY VOLUNTARY MEDICAL PLAN
FOR WAIALUA AGRICULTURAL CO., LTD.
EMPLOYEES AND THEIR FAMILIES**

This Plan is offered by the Company to provide for continuation at the lowest possible cost to the employee of the medical care heretofore furnished to employees and their families.

Exhibit "E"—(Continued)

SCHEDULES OF RATES

(Per Month)

Earnings—	Schedule 1
Wages or	Employees within
Salary Group	Units 1, 2 & 3
Single	\$1.65
Married	1.40
Spouse (Additional)	1.10
First Child (1-18)	1.10
Additional Children (1-18)	1.10
* Maximum Rate	6.00

* Families of six or more pay maximum rate. Size of family unlimited.

CERTIFICATE OF MEMBERSHIP

WAIALUA AGRICULTURAL CO., LTD.

MEDICAL PLAN

This certifies that as of....., 19....
has become a member of
 Waialua Agricultural Co., Ltd., Medical Plan.

Payment made as follows:

Dues—Month of	\$
.....	\$
.....	\$.....
Total	\$

WAIALUA AGRICULTURAL
 CO., LTD.

By [91]

Exhibit "E"—(Continued)

Sample Copy (To be prepared in triplicate)

**APPLICATION FOR MEMBERSHIP IN WAIALUA
AGRICULTURAL COMPANY, LTD., MEDICAL PLAN**

I hereby make application for membership in the Waialua Agricultural Co., Ltd., Medical Plan. I agree to abide by the regulations set up by the Company for this Medical Plan and I hereby authorize the Company to examine any Hospital or Physician's records concerning me.

Full Name (Print).....

First Middle Last Name

Address: (Camp & House No.).....

Bango Number:.....

Job Title:..... Age:..... Height:.....

Weight:..... Married:..... Single:..... Male:.....

Female:.....

List all dependents below:

(Wife, husband, aged or infirm parent living with employee and classified by the plantation as dependent on Nov. 19, 1946, and all children under 18 yrs. old.)

	Name	Date of Birth	Relationship
1.
2.
3.
4.
5.
6.
7.
8.

I understand that upon execution of this application and payment of dues as indicated below, I will be entitled to service under the plan.

I also understand that I will continue to be a member of the plan only as long as I am in the employ of the company and monthly dues are paid on or before the 15th of each month.

Date:..... Signature:.....

Signature of Witnesses if Application

is signed by Mark:

Amount of monthly dues:.....Dues Schedule No.....

Amount paid with this application: \$...... [92]

Exhibit "E"—(Continued)

Sample Copy (Alternate)

(To be prepared in triplicate)

APPLICATION FOR MEMBERSHIP IN WAIALUA
AGRICULTURAL COMPANY, LTD., MEDICAL PLAN

I formally accept the temporary Medical Plan of the Waialua Agricultural Co., Ltd., pursuant to the Agreement of Nov. 19, 1946 between my authorized collective bargaining agents and representatives of the Waialua Agricultural Co., Ltd. I am aware that after May 19, 1947, and in accordance with the understanding between representatives of the company and my collective bargaining agents, another plan with standard provisions for medical and hospital service may be substituted for this plan. I also understand that at the time of substitution this plan will be discontinued, and all obligation of the Waialua Agricultural Co., Ltd., will cease.

Full Name (print) :.....

First Middle Last Name

Address: (Camp & House No.).....

Bango Number :.....

Job Title:..... Age:..... Height:.....

Weight:..... Married:..... Single:..... Male:..... Female:.....

List all dependents below:

(Wife, husband, aged or infirm parent living with employee and classified by the plantation as dependent on Nov. 19, 1946, and all children under 18 years old.)

Name: Date of Birth: Relationship:

1.
2.
3.
4.
5.
6.
7.
8.

I understand that upon execution of this application and payment of dues as indicated below, I will be entitled to service under the plan.

I also understand that I will continue to be a member of the plan only as long as I am in the employ of the company and monthly dues are paid on or before the 15th of each month.

Date:..... Signature:.....

Signature of Witnesses if application

is signed by mark:

Registration Fee: \$1.00

Amount of Monthly Dues: \$..... Dues Schedule No.....

Amount paid with this application \$..... [93]

Exhibit "E"—(Continued)

EMPLOYEE'S REJECTION OF TEMPORARY
MEDICAL PLAN

(Sample Copy)

I have received explanatory data outlining the Temporary Medical Plan being offered to employees of Waialua Agricultural Company, Limited, and for which I am eligible. I have had an opportunity to apply for participation.

After due consideration I elect not to participate in this Plan.

I understand that this Plan is the only Company plan under which my employer will aid in providing medical attention for me and my family.

.....
Signature of Employee

.....
Date

.....
Signature of Witness [94]

Exhibit "F"—(Attached to Exhibit "F")

Statement of Consideration to Guide Appraisal and
Determination of Fair Rentals on Existing
Plantation Houses

1. The employers do not intend to make housing a profit making venture, as such.

2. Computation of fair rentals will contemplate in addition to the foregoing, consideration of the

following factors as well as any others considered pertinent by the appraisers.

(a) Fair value of land and dwellings will be determined by the American Appraisal Company if approved by the Union or other appraiser of comparable standing mutually agreed upon, taking into consideration such factors as in the opinion of the appraisers should be considered in recognition of the principle that the housing operation is not being undertaken as a profit making venture, as such, it being stipulated, however, that book value will not be used in establishing said value.

(b) Interest and depreciation based on (a).

(c) Taxes.

(d) Insurance.

(e) Maintenance and Repairs.

(f) Village Services.

(g) Administrative Expense.

3. Any adjustments in rent will be made on an industry wide basis.

4. Union will be afforded an opportunity to present its position to the appraiser (prior to final determination) on the determination of fair rentals on existing plantation housing including the presentation of their views on the weighing or consideration that in its opinion should be given any or all of the above factors. [95]

[Title of District Court and Cause.]

AMENDMENT OF COMPLAINT

Now comes the plaintiff, by its attorneys, and, in accordance with Rule 15(a), amends its Complaint in the above entitled cause by striking out paragraphs 6 and 7 and inserting in lieu thereof the following: [105]

6. Plaintiff contends:

(a) That all of the employee defendants, as well as all other employees of plaintiff similarly situated, are employees "employed in agriculture" as the term "agriculture" is defined in Section 3(f) of the Act and that, therefore, such employees are exempt from the overtime provisions of the Act i.e., Section 7(a), as provided by Section 13(a)(6) of the Act;

(b) That if any of said employees is not so exempt by virtue of said Section 13(a)(6), he is an employee in a place of employment where his employer, i.e., the plaintiff, is engaged in the "processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup. . . ." and that, therefore, as provided by Section 7(c) of the Act, such employee is exempt from the overtime provisions of the Act, i.e., Section 7(a), and that such exemption is applicable throughout the year, including the "off season" referred to in paragraph 31 hereof; and

(c) That the employee defendants, when they are engaged in work in connection with the repair and maintenance of the plantation houses and related

facilities hereinafter described, and all other employees of plaintiff when they are engaged in performing similar work are not "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in Sections 3(b) and 3(j) of the Act and that, therefore, none of the provisions of the Act applies to said employees, whether or not said employees are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c).

7. Defendants contend and have done so repeatedly to the plaintiff:

(a) That none of the employee defendants and no [106] other employees of the plaintiff who are similarly situated are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c) or otherwise;

(b) That if any of said employees is exempt by virtue of Section 7(c), such exemption is inapplicable to said employees during the "off season" referred to in paragraph 31 hereof; and

(c) That all of the employee defendants and all other employees of the plaintiff who are similarly situated are "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7(a) of the Act.

Dated:

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE.

[Endorsed]: Filed July 18, 1947. [107]

[Title of District Court and Cause.]

ANSWER

Come now the defendants above named and by way of answer to the complaint on file herein, admit, deny and aver as follows:

I.

Defendants admit, except as follows, the general accuracy of the allegations contained in subparagraphs 2 to 37, inclusive, of said complaint:

(A) Defendants have no information or belief with reference to the allegations contained in subparagraph 2 of said complaint sufficient to enable them to answer such allegations, and based on such lack of information or belief, defendants deny each and every, all and singular, the allegations contained in said subparagraph 2.

(B) Defendants deny each and every, all and singular, the allegations contained in subparagraph 6 of said complaint.

(C) With reference to subparagraph 9 of said complaint, [108] defendants deny that, "Without a determination of the controversy herein it is impossible for the plaintiff to know and ascertain whether it is violating the Act in not paying overtime compensation to said employees in accordance with Section 7(a) thereof," and in this connection defendants aver that they are informed and believe that plaintiff has been for some time and is now paying overtime compensation pursuant to the Fair Labor Standards Act to all or at least some of the defendants herein, and others similarly situated,

and defendants demand of plaintiff that it produce the names of such of defendants, and others similarly situated, as are being so compensated and the basis upon which such overtime compensation is being so paid.

Further referring to the allegations of said subparagraph 9, defendants deny that, "If the contentions of the defendants are correct the plaintiff will be subject to . . . (e) strikes and labor disturbances if it fails to comply with the contentions of the defendants"; or that plaintiff will be subject to "(f) great expense in paying overtime compensation in accordance with the provisions of Section 7(a) of the Act to the employee defendants and other employees of plaintiff engaged in work similar to that of the employee defendants and in planning and instituting new methods of operation resulting in great loss and damage to it in order to meet the expense of paying such overtime, if, by reason of the defendants' contentions and the perils of not complying with same, plaintiff feels compelled to endeavor to comply."

(D) With reference to the allegations of subparagraph 10 of said complaint defendants deny that all of the equipment of the plaintiff in plaintiff's "mill," as such term is defined in said subparagraph 10, is used in the actual processing of sugar cane into raw sugar.

(E) With reference to the allegations of subparagraph 24 of said complaint, defendants have no information or belief [109] sufficient to enable

them to answer the allegations in said subparagraph that, "None of the electric power distributed to non-plantation users by the plaintiff is used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce nor is it transmitted into interstate commerce," and based upon such lack of information or belief, defendants deny each of the above quoted allegations.

II.

With reference to the allegations contained in subparagraphs 38 to 85, inclusive, of said complaint, defendants admit, deny and aver as follows:

(A) Subparagraph 38, Ciraco Maneja. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Fair Labor Standards Act, hereinafter referred to as "the Act") only during such times as he is engaged in preparing ratoon cane fields, or in making minor repairs in the field to the tractor which he operates in the ratooning work.

(B) Subparagraph 39, Takeo Miyazaki. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act except when he is engaged in cutting firewood for use as fuel by the plaintiff's employees living in the plantation villages, or assisting in the tractor repair shop as a mechanic's helper in repairing tractors.

(C) Subparagraph 40, Cerilo Lendio. Defend-

ants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when he is engaged in operating tractors making furrows for the planting of cane seed and in making minor repairs in the field on the machine which he operates.

(D) Subparagraph 41, Antone Vierra. Defendants admit that [110] this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when he is engaged exclusively in hauling fertilizer and other field supplies from the plantation warehouses and yard area to the plantation fields.

(E) Subparagraph 42, Augustine Lorenzo. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) except when he is engaged in clearing ditches and tunnels during non-irrigation periods.

(F) Subparagraph 44, Tadao Watanabe. Defendants admit that this employee is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when he is engaged in bulldozing cane under telephone and power lines and out-of-way corners which cannot easily be reached by the regular cane loading machine.

(G) Subparagraph 47, Tsuruo Hayashi. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when

he is operating a cane loading machine in the fields of the plantation or in making minor repairs to such machine in the field.

(H) Subparagraph 48, Cornelio Asuncion. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when he may be assisting in weeding, cultivating or helping to clear storm ditches or assisting in the removal of irrigation flume preparatory to plowing.

(I) Subparagraph 49, Roque Crisostomo. Defendants admit that this employee defendant is "employed in agriculture" (as the term "agriculture" is defined in Section 3(f) of the Act) only when he is engaged exclusively in operating a grader to build irrigation banks to prevent the run-off of irrigation water, or to [111] level off high spots and fill in old fields preparatory to planting.

(J) Subparagraph 56, Ushinosuke Kondo; Subparagraph 57, Teruichi Kubo; Subparagraph 58, Masaiki Oato; Subparagraph 59, Simon Cumlat; and Subparagraph 60, Apolonio Lazo. Defendants admit that these employee defendants are, during the so-called grinding or crushing season only, and then only between 2:00 p.m. Sunday of each week and 2:00 p.m. of the following Saturday of each week, engaged in a place of employment where their employer (the plaintiff) is engaged in the "processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . ."

(K) Subparagraph 61, Giichi Hamamoto. De-

fendants admit that this employee defendant is engaged in a place of employment where his employer (the plaintiff) is engaged in the "processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . ." only when he is operating a sugar bagging machine which bags raw sugar flowing from the centrifugals.

(L) Subparagraph 79, Margaret Fujiwara. Defendants admit that this employee defendant is engaged in a place of employment where her employer (the plaintiff) is engaged in the "processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . ." only when she is making daily analyses of sugar juice and syrups, and analyses of mill boiler water, steam pump boiler water and locomotive boiler water to determine the hydrogen, density and salt concentrates thereof, and only while cane is actually being processed in plaintiff's mill.

Except as admitted above, defendants deny that any of the employee defendants, whose work is described in subparagraphs 38 to 85, inclusive, or any person similarly situated, are "employed in agriculture" as defined in Section 3(f) of the Act), or that any of said employees or persons are engaged in a place of employment where their employer (the plaintiff) is engaged in the "processing [112] of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . ." Defendants further aver that all of the employee defendants whose work is described in subparagraphs 38 to 85, in-

clusive, are “engaged in commerce or in the production of goods for commerce” or in a “process or occupation necessary to the production thereof.”

Prayer

Wherefore, defendants respectfully pray that at the trial of this action the plaintiff will be required by the Court to advise it as to those of the defendants, and others similarly situated, who are being paid by plaintiff the overtime compensation provided for in the Act, and that upon the pleadings herein, and evidence adduced at the trial of this action, the Court declare, order, adjudge and decree as follows:

(A) That none of the employee defendants listed in subparagraphs 38 to 85, inclusive, of the complaint on file herein and performing the work described therein, except as conceded by defendants in the foregoing answer, nor other persons similarly situated, are employees “employed in agriculture,” as the term “agriculture” is defined in Section 3(f) of the Act, and that, therefore, none of said employees or persons come within the exemption set forth in Section 13(a)(6) of the Act.

(B) That although certain of the employee defendants, as more particularly specified in the foregoing answer, and other persons similarly situated, are from time to time during certain work weeks of the processing season, employed in a place of employment where their employer (the plaintiff) is engaged in the “processing of . . . sugar cane . . . [113] into sugar (but not refined sugar) or

into syrup . . .” from 2:00 p.m. Sunday of each work week to 2:00 p.m. of the following Saturday of such work week, they are not so employed between 2:00 p.m. Saturday and 2:00 p.m. of the following Sunday of each week during such processing season, nor at any time during the so-called off-season, as such off-season is more particularly described in the complaint on file herein.

(C) That none of the employee defendants named in subparagraphs 38 to 85, inclusive, except as specified in the preceding paragraph, nor other persons similarly situated, are engaged in a place of employment where his employer (the plaintiff) is engaged in the “processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . .” either during the processing season or during the so-called off-season.

(D) That all of the employee defendants named in subparagraphs 38 to 85, inclusive, of the complaint on file herein, and other persons similarly situated, are “engaged in commerce or in the production of goods for commerce,” or in a “process or occupation necessary to the production thereof.”

(E) That all of the employee defendants named in subparagraphs 38 to 85, inclusive, in performing the work described therein, except as to certain work of some of said defendants, as more particularly set forth in paragraphs A and B of this prayer, and all persons similarly situated, are subject to the overtime provisions of the Act.

(F) That plaintiff shall forthwith render an [114]

accounting to each employee defendant, and to all other persons similarly situated, and shall pay to each such employee and person the unpaid overtime compensation due him under the Act, plus an additional and equal sum as liquidated damages, subject, however, to the provisions of any compromise or release agreements heretofore entered into between plaintiff and such employees and persons, or their duly authorized representatives.

(G) That plaintiff shall reimburse the defendants for their costs of suit incurred herein, and in addition thereto shall pay to counsel for defendants a reasonable sum as and for attorney's fees.

Defendants further pray for such other relief as to the Court may seem just and proper.

Dated September 12, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
/s/ RICHARD GLADSTEIN,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 12, 1947. [115]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Waialua Agricultural Company, Limited, Plaintiff herein, by and through Rufus G. Poole and E. C. Moore, its Attorneys, and Ciraco Maneja, Takeo Miyazaki, Cerilo Lendio, Antone Vierra, Augustine Lorenzo,

Haru Kibota, Tadao Watanabe, Koichi Okouchi, Domingo Menor, Tsuruo Hayashi, Cornelio Asuncion, Roque Crisostomo, Peter Holmberg, Hatsu-suke Sera, Tkumi Okouchi, Pedro Dumlao, Bernabe Hernandez, Domingo Guigui, Ushinosuke Kondo, Teruichi Kubo, Masaiki Oato, Simon Cumlat, Apolonio Lazo, Giichi Hamamoto, Dionicio Carrit, Seraphine Robello, Toshio Tanaka, Barney Faria, Fumio Sunahara, Hirosaku Takata, Kiichi Yamada, Alfred Reyher, Masaru Ezawa, Damaso Claunan, Antone Robello, Manuel Damas, Keichi Kamiyama, Yoshiji Yamada, Edwin Mori, Genjiro Hironaka, Jiro Sakai, Margaret Fujiwara, Louis Pacheco, Yukishige Tsutsui, Yack Chun Lee, Eiko Sakaguchi, Moses Fernandez and Toshio Kashiwabara, Defendants herein, by and through their Attorney, Richard Gladstein, in Civil Action No. 787, filed in the above entitled Court on April 9, 1947, that competent witnesses called on behalf of the Plaintiff and the Defendants above named would testify as follows:

Part I.

DESCRIPTION OF THE PLANTATION AND ITS OPERATIONS

1.

Name and Location of Company

Waialua Agricultural Company, Limited, hereinafter sometimes referred to as the "Plantation,"¹

¹ The term "Plantation" is also used in this stipulation to mean the geographical area on which the Waialua Agricultural Company, Limited, is producing sugar cane, processing it into raw sugar and conducting related operations.

is a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaiia, having been organized in 1898, with [118] its head office located in Honolulu, City and County of Honolulu, Territory of Hawaii, and its plantation located in the District of Waialua, City and County of Honolulu, Territory of Hawaii.

2.

The Business of the Plantation

Since the original incorporation of the Company in 1898, the business of the Plantation has been and continues to be the growing, cultivating and harvesting of sugar cane on lands owned or leased by the Plantation; the processing of such sugar cane into raw sugar and molasses; the bagging, loading and shipping of the raw sugar to refineries situated in the continental United States; and the loading and shipping of molasses in bulk to continental United States, all of which is hereinafter described. The loading of the bagged raw sugar and of the molasses into railroad box and tank cars of the Oahu Railway & Land Company, an independently owned and operated carrier (hereinafter referred to as the "O. R. & L."), at the site of the mill² and the pushingg of such cars from such

²The term "mill" as used herein means the building and equipment of the plantation used in the actual processing of sugar cane into raw sugar, including cane carrier, cane cleaning plant and scales, crushing plant, boiling house, fire room, power plant, sugar warehouse, and molasses tanks, and all equipment therein.

site onto a nearby spur of the O. R. & L., complete the operations of the Plantation and the work of its employees relative thereto. The Plantation does not engage in any sugar refining operation.

3.

Relative Position of Plantation in Territory

The Waialua Agricultural Company, Limited, is one of thirty-four (34) sugar plantations located, operating and [119] doing business in the Territory of Hawaii (hereinafter referred to as the "Territory"). The total raw sugar produced by these thirty-four plantations in 1945 was 821,216 tons. Of this amount the Waialua Agricultural Company, Limited, produced 56,193 tons or slightly less than 7%, and as such it ranked as the third largest producer of raw sugar in the Territory in 1945. The total number of employees of the thirty-four plantations as of September 1, 1946, was 29,517 and was approximately 28% of the total number of persons privately employed in the Territory. The raising of sugar cane and the processing of it into raw sugar constitutes the principal industry in the Territory in terms of the number of persons privately employed, invested capital and the value of the product produced. Between the years 1941 and 1945, the Territory produced between 13.30% and 10.76% of all sugar, both beet and cane, distributed for consumption in the continental United States.

4.

Sugar Cane Not an Article of
Interstate Commerce

Sugar cane is highly perishable, as will be hereinafter described, and starts to deteriorate immediately after harvesting. To avoid serious losses it must be processed into sugar, syrup or molasses within a few hours after it has been burned³ or severed from the ground. For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown. Sugar cane [120] never moves into interstate commerce in its natural state. Except for small amounts which are used as seed cane, it is grown exclusively for the purpose of producing sugar, syrup or molasses and it is these end products, which are the result of the processing of cane, which becomes articles of interstate commerce.

5,

Some General Facts About the Plantation

At the present time the Plantation grows and produces sugar cane on 9,663 acres of land owned or leased by it. Substantially all of the land now devoted to sugar cane production has been owned or leased by the Plantation and used by it for this purpose since 1910. The table set forth on page

³ The references herein to the "burning" of sugar cane are to the burning of the leaves and rubbish in the cane field as part of the harvesting operation. In such burning the cane stalks are undamaged.

73 of this stipulation will show that the number of acres under cane cultivation since 1910 fluctuated above and below the present cane acreage by approximately 10%. The acreage reduction shown for 1935 was due to the establishment of quotas by the Federal Government under the authority of the Agricultural Adjustment Act of 1933, 7 USCA § 601 et seq., but the acreage eliminated from cultivation at that time was eliminated on a temporary basis only, and continued as a part of the plantation and was subsequently replanted. In 1915 and 1920 the acreage exceeded present acreage by some 10%. This was due to the fact that the Plantation was at that time attempting to produce cane on certain of its marginal areas, the use of which for such purpose was later abandoned. The cane growing land of the Plantation, its buildings and yard area, and other lands owned or leased by the Plantation, but unsuited for cane growing, including a wooded area from which firewood is cut for use as fuel by plantation employees living in the plantation villages hereinafter described, form a contiguous and compact area as shown by Exhibit "A" which is attached hereto and made a part hereof, except that an area of 470.42 acres of cane growing land located on the lowlands at the west end of the Plantation is connected with the principal area of the Plantation only by a strip of land 40 feet wide and 1,150 feet long over which the Plantation has a perpetual easement for rights-of-

way for the moving of its agricultural equipment supplies and sugar cane.

Sugar cane is grown in fields which in one area of the plantation are cut by deep gulches and waste land unsuited for cane production, while in other areas the fields are separated only by plantation roads or public highways. Cane growing land is crisscrossed with a network of plantation field roads and a narrow gauge plantation-owned railroad. Planting, cultivating and harvesting supplies, materials and equipment are transported over these field roads. The railroad is used to transport cane from the fields to the mill and to transport some agricultural supplies and harvesting equipment between the plantation buildings and yard area and the fields. There is also a network of irrigation ditches throughout the plantation and a number of water storage reservoirs, since all cane grown on the plantation must be irrigated.

All the lands devoted to the growing of sugar cane are managed and operated by the Plantation as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being [122] plowed and furrowed for new planting, some is being "ra-

tooned'' (a process hereinafter described), some acreage is in young growth, some in old growth nearing maturity and other acreage is being harvested. The growing, harvesting and processing of the cane and the marketing of the raw sugar constitute one continuous and year around operation except that annually harvesting and processing of cane are suspended for approximately three (3) months for the purpose of reconditioning the mill and equipment, as hereinafter described.

As of September 1, 1946, the Plantation had a total of 1,144 employees. The Plantation considers this number of employees sufficient for its operations as conducted at the present time. Its labor requirements are substantially the same throughout the year.

The Plantation has ten (10) job classifications for its rank and file or non-supervisory employees, who numbered 959 as of November 19, 1946. The hourly wage rates for such ten (10) classifications range from a minimum of 80c to a maximum of \$1.38. The Plantation, however, employs 12 handicapped, superannuated and part-time workers who receive a minimum hourly wage of 74c. The weighted average hourly wage rate for all non-supervisory employees of the Plantation is 90.8c. The existing collective bargaining agreement dated November 19, 1946, between the Plantation and the International Longshoremen's and Warehousemen's Union, Local 145-7, as collective bargaining agent for most of the non-supervisory employees,

which contract sets forth the wages, hours and working conditions of the employees herein involved, is attached hereto as Exhibit "B" and made a part hereof. [123]

Prior to March 1, 1940, the Plantation paid no overtime compensation but since that date it has paid time and one-half for all hours worked in excess of eight in one day and forty-eight in one work week. Work performed on New Year's Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day have also been compensated at the rate of time and one-half since March 1, 1940.

On July 12, 1943, most of the office staff and most of the warehouse employees were placed on a 40-hour work week schedule and have continued since that date on such schedules with time and one-half being paid for all hours worked in excess of forty per week.

Since October 4, 1943, employees in the mill and in the allied service shops have been paid time and one-half during the off season for all hours worked in excess of forty per week.

It is the contention of the plaintiff that the provisions of the Fair Labor Standards Act do not require it to pay any of its employees overtime compensation. Conversely, it is the contention of the defendants that such Act requires the plaintiff to pay all of its employees time and one-half for all hours worked in excess of forty per week.

All Plantation operations and activities are under the over-all direction and control of the

Plantation manager. Under him as immediate assistants are the assistant manager [124] and three staff assistants, the field and mill coordinator, and the personnel training and development director.

The various plantation operations described hereinafter are each under the supervision of a manager or superintendent as follows: Field operations, the field superintendent; mill and allied shop operations, the cane processing superintendent; warehouse, the warehouse superintendent; construction, the construction superintendent; accounting, the office manager; and civil engineering, the civil engineer. All of these superintendents are responsible to the plantation manager.

6.

Location of Buildings and Facilities on Plantation

The plantation buildings, including the mill, which processes the cane into raw sugar, a number of buildings housing repair shops for the maintenance of field, transportation and mill equipment, warehouses for plantation supplies, and other buildings having functional relation to the entire plantation operations, are centrally located on the lowlands of the plantation in a small, compact and contiguous area. The administration offices of the Plantation are located on the plantation within a distance of not more than one-fourth ($\frac{1}{4}$) of a mile from the other buildings. Surrounding such plantation buildings and administration office area are

plantation-owned houses in which employees working in both field and mill live with their families. Community service establishments and recreational facilities are also located here. Public highways and an independently owned narrow gauge railroad cut across this area. Other company-owned facilities include a hospital and a general merchandise retail store which sells to both plantation employees and the general [125] public. Located along the public highways running through the plantation are non-plantation-owned stores, shops, theatres, automotive service stations, barber shops, churches, a bank and other facilities which are normally a part of any typical small community in a farming area. See Exhibit "A" which illustrates the general description given above of the location of the cultivated areas, gulches, waste lands, buildings, plantation and private communities and highways.

7.

Preparation of Land for Planting

Sugar cane is a giant bunch-grass producing clumps or stools of solid strongly jointed stalks or sticks measuring from 1 inch to 2½ inches in diameter, well developed stalks reaching on an average 10 feet to 15 feet in height. The sugar cane grown on the plantation requires generally 22 to 24 months to mature after planting or "ratooning." Three or four crops can be obtained from each planting, fields being replanted each six to eight years. Between these times of planting a field is "ratooned"

at the end of each harvest. Seed used for planting is actually 24-inch to 30-inch young cane cuttings. These cuttings of cane have nodes every 5 inches to 8 inches apart. At every node there is a bud which forms a new stool. Planting seed is obtained from cane that is eight to twelve months old.

Plowing of the field for the planting of new crops commences soon after the harvesting operations on the previous crop are completed. The plowing is performed with 110-horsepower diesel powered tractors with rooter type subsoil attachment. The subsoil is broken up to a depth of 18 inches to 24 inches. Two or more subsoil plowings of each field are carried out, the second plowing being performed at right angles to the first. After the field has been subsoil plowed twice, a [126] disc plow (eight 28-inch discs) is drawn by a tractor over the field breaking up large cane stools and lumps and turning over the soil. When this operation is completed, the subsoil tractor subsoils the field once again and the final plowing is completed with the disc plow. This leaves the field well broken up and ready for the planting operation. Each type of plow used in the above operation is manned by a tractor operator and helper. Tractors may be operated in two shifts or one shift may work longer than the customary eight hours depending upon the urgency of completion of the plowing operation.

After the field is plowed, a crew of six men including a tractor operator using a tractor with a "stone boat" attachment, clears the field of obstruc-

tions, such as stones. This same crew and tractor are also used to move concrete irrigation flumes and pipes to the proper location, if the locations are to be changed.

8.

Planting is done by a planter machine mounted on a 75-horsepower diesel powered tractor manned by a crew of eight men including the tractor operator. This planter consists of a platform which will hold sixty to seventy-five bags of seed weighing sixty-five to ninety pounds each. The bagged seed is spotted in the field prior to planting and is loaded onto the planter by the planting machine crew. A fertilizer hopper is also mounted on the tractor, and fertilizer is distributed concurrently with the planting. The planter progresses across the field and two mold boards attached to the tractor drawbar make two "V" shaped furrows from fourteen to eighteen inches deep. The seed is guided [127] by chutes from the platform of the planter to the furrows; fertilizer is distributed in the furrows from the fertilizer hopper. The planting machine plants about one acre per load. After the planter drops the seed and fertilizer, a gang consisting of ten to fifteen men with hoes follows the planter spacing the seed and covering it with an inch or two of soil. A flume laying gang, consisting of fifteen men under the supervision of a flume laying foreman, then proceeds to install concrete flumes. These flumes are spotted throughout the field having been brought up by truck from the plantation

concrete products plant where they are made. Sections of concrete flumes are from 30 inches to 36 inches long and are approximately 15½ inches wide at the top. A small crew of eight men construct necessary headings, which are special wood or concrete flume headings or gates required at the point at which water is brought into the field. Field irrigation lines are carefully plotted out according to prearranged plan and method which will be described hereafter. As soon as possible after the seed is planted, irrigation water is applied.

Approximately six weeks after the planting has been completed and the crop has commenced to grow, further planting is performed to the extent of filling in any blank spots where the cane seed has failed to germinate. The seed is hauled by truck to the edge of the fields and then spotted throughout the field by pack mules. This work is done by a pack mule man, with a helper. Holes are dug by hand hoe, and seed pieces are then laid in these holes by hand and covered to a depth of two inches. A gang of approximately twenty-four employees perform this work.

9.

Ratooning

As previously stated, fields are replanted each six or eight years. Between these times of planting a field is "ratooned" at the end of each harvest. "Ratooning" is a term referring to the operations performed after a field is harvested to prepare the field for the growing of another crop. In such prep-

aration of the old cane stools or stubble are left in place and the ground is refurrowed into rows. The undamaged cane stools or stubble will then send up new shoots upon application of water and fertilizer to the field. New seed is added to fill in blank spots or to replace damaged stools or stubble.

10.

Cultivation

To control weeds, herbicides are applied. The first application is performed within one week after planting in order to destroy the first germination of the weeds. Thereafter herbicides are applied at intervals varying from fifteen to twenty days depending on the weather and the condition of the field. The last application is performed when the cane is approximately six months old. Thereafter spraying of herbicides is limited to the spraying of irrigation flume areas, for a distance of ten to fifteen feet on either side of the flume, and also spraying of the area along the main ditches and the level ditches within such particular field area.

Herbicide gangs are composed of thirteen to nineteen men. Each man in the gang is equipped with a knapsack sprayer; that is, a sprayer which is strapped to the backs of the men, the herbicide being applied by means of a nozzle at the end of a hose which is directed by hand as the gang members walk along the areas being treated.

After two or three applications of the herbicides, a weeding gang composed of fifteen to twenty-five men remove the remaining weeds with the use of hoes. A gasoline driven tractor equipped with two

revolving discs at either side of the cane stool is sometimes used. The tractor cuts the weeds and throws them to the top of the banks between the rows of planted cane.

Truck sprayers of herbicides are employed to control weed growth on plantation field roads and along storm ditches and main irrigation ditches. This operation utilizes a truck which carries a tank of 1,000-gallon capacity and a special spray pump which pumps the herbicide through a hose pipe equipped with a spray nozzle. One man then guides the nozzle along the road sides and ditches.

Although insecticides are occasionally called for, their application is infrequent. When performed, the method used is a similar knapsack spraying, applying the insecticides to the top of the cane. Herbicide gangs perform this operation also.

A total of approximately forty men is engaged in herbicide operations.

11.

Fertilizing

After planting there are two or three additional applications of fertilizer before the cane reaches the age of seven months. The fertilizer is hauled by truck to the edge of the field or nearest point of distribution and then reloaded on pack mules, which place bags alongside the irrigation flumes or level ditches according to the number of pounds to be applied per acre. Each man in the fertilizer gang, numbering twelve men, is equipped with a bag which he fills with fertilizer and then proceeds along the cane rows applying [130] the same by hand near the base of the cane stools.

Irrigation water is also used to apply fertilizer to the field after the cane is too high to permit hand application. Normally, two applications of fertilizer are applied by water.

Fertilizer applied for the year 1945 totaled 2,855 tons.

12.

Irrigation

Intensive irrigation throughout the year is required for the entire plantation acreage devoted to sugar cane production. Although the normal annual rainfall is about thirty inches, precipitation is unevenly distributed throughout the year, thereby requiring supplemental irrigation at all times.

An extensive and comprehensive system of water supply from surface and artesian sources has been developed by the Plantation since it was incorporated in 1898. The primary source of surface water is the Wahiawa Reservoir, constructed and developed in 1904-06 and operated by another company. This reservoir has a storage capacity of 2,540 million gallons, obtained from a mountain watershed. Water from this reservoir is conveyed through four miles of tunnel and open ditch to the 750-foot contour of the Plantation where it is conveyed through a major canal forming in general the upper boundary of the cultivated area.

Surface water is diverted by small dams at the headwaters of the streams running down the gulches indicated as wasteland on the map marked Exhibit "C" which is attached hereto and made a

part hereof. Flow from the streams in these gulches is sporadic and reservoir capacity to store freshet peaks is limited.

In addition to the above sources of water, a system [131] of deep well pumps has been developed gradually on the Plantation since 1898 to tap the artesian slopes from the two mountain ranges lying on either side of the Plantation. The present pump system comprises twenty-two pumping stations with a rated capacity of 111.36 million gallons per 24-hour day. Three of these units are powered by steam; the remainder are operated by push-button controlled electric power units.

In addition to supplying irrigation water for sugar cane production, the artesian system supplies the mill and the domestic water needs of the plantation villages. Occasionally, water from artesian wells is also supplied to home gardens of plantation employees and to small farmers, all of whose produce is consumed locally. Artesian water may also be used for fire protection purposes. Surface flow water may be used, however, for home gardens, as well as for fire protection needs.

The following table summarizes the amount of water received from various sources during the years 1941-1945, and reflects the amounts of these totals which have been required for irrigation purposes:

	(In millions of gallons)					
	1940	1941	1942	1943	1944	1945
Steam Pumps.....	4,186.93	5,082.49	3,059.50	4,250.56	5,842.23	6,495.03
Electric Pumps.....	12,183.16	12,347.43	7,747.88	8,445.01	12,601.78	11,979.92
Total Pump Water.....	16,370.09	17,900.47	10,807.38	12,695.57	18,444.01	18,474.95
Wahiawa Res.....	9,835.10	7,508.97	8,835.71	9,366.64	8,000.40	6,539.75
Helemano Stream.....	1,874.82	1,710.95	2,306.17	1,698.47	1,820.14	1,023.05
Opaeula Stream.....	1,926.33	2,138.21	1,979.71	1,855.05	1,590.53	1,014.43
Kamananui Stream.....	1,235.88	1,140.51	1,852.34	1,193.41	567.35	229.58
Total Surface Water.....	14,945.83	12,541.40	15,069.35	14,182.48	12,028.95	8,806.81
Total Water Received.....	31,315.92	30,441.87	25,876.73	26,878.05	30,472.96	27,265.26
Total Water Used for Cane Irrigation.....	30,547.71	29,895.84	24,665.12	26,002.83	29,658.02	26,506.95

A flexible system of earth, concrete and stone-lined canals, steel inverted siphons, and concrete pipes and flumes distributes water to the cane fields of the Plantation. Approximately 50 per cent of the cultivated land of the plantation is irrigated solely by surface water; approximately 5 per cent is irrigated solely by artesian water; and the balance is irrigated by both surface and artesian water.

The plantation is traversed by three main supply canals. The Wahiawa Ditch at the upper boundary of the cultivated area follows approximately the 750-foot contour and delivers gravity water from the Wahiawa Reservoir, supplemented by flows from the other stream diversions. A group of canals at approximately the 300-foot contour receive and distribute water from high-lift pump units, and a third group of canals along the 100-foot contour deliver low-lift pump water. A few low-lift pumps supply artesian water directly to certain areas through separate ditch systems.

In practically all cases, water is delivered from each source to several areas of the plantation across deep ravines and rugged topography which necessitate the use of long inverted steel siphons of 24 to 54-inch diameter or of high flumes. Lateral distribution from each canal is provided by "straight ditches," usually lined with stone or concrete to prevent erosion, through which water is delivered to the fields or to the next lower canal in the system. Distribution reservoirs, of which 30 ranging in capacity from 1.0 to 50. million gallons, have been

constructed by the Plantation provide night storage and equalize water flows.

One of two methods of irrigation is employed depending upon the topography. On flat lands with a slope of two [133] feet or less to each hundred feet, the field is in furrows running down the slope. Low level ditches extend across the fields at right angles to the furrows. Water flows from the field supply ditches into the level ditches which are spaced approximately 200 to 300 feet down the slope, and the irrigator diverts water into the cane furrows, either by cutting through the banks of the level ditches with a hoe or by using controlled gates on permanent pipes connecting with each furrow. The method described is referred to as the "Long Line" method.

Another method used is the "Herringbone" method. If the field slope is in excess of two feet per one hundred feet, the concrete flumes previously mentioned are laid along the ridges or highlands. The field slope may be as high as 10 or 12 feet per one hundred feet. Openings cast in the sides of the walls at the time of making are spaced so that these openings are opposite the head of each furrow. The furrows run across the field at a moderate grade. The irrigator adjusts the flow of water through the holes in the concrete flume with the use of a metal scoop placed in the flume. These scoops are made in the plantation tinsmith shop for this purpose.

Four water supply ditchmen are responsible for the inspection, maintenance and control of the upper reservoirs and intake dams. Twelve water distribution ditchmen are responsible for receiving the irri-

gation water at the main canals and distributing it to the field irrigators. During periods when irrigation is suspended, both the water supply ditchmen and the water distribution ditchmen are engaged in maintenance, cleaning and minor repairs to the ditch and reservoir systems. At present, 105 employees are engaged in field irrigation and incidental cultivation of specific fields. These field irrigators receive water from the field supply ditch or one of [134] the main canals and distribute it according to one or the other of the two methods described above.

The entire irrigation system of the Plantation is located on lands owned or leased by the Plantation and constituting a part of the integrated farming unit. The location of the principal plantation irrigation channels, canals, reservoirs and pumps is shown on Exhibit "C".

The frequency of irrigation applications varies slightly during the year, depending greatly on natural rainfall received and to a lesser extent on the temperature and amount of sunlight. The dominant factor in determining the frequency of irrigation is the age of cane and the consequent spread of the root system and the exposed leaf mass. The mass of stalks and leaves offer great resistance to the flow of irrigation water at the base of the plant, thereby requiring heavy applications of water. A general schedule of irrigation frequency, for periods without rainfall in excess of 0.50 inch, at the Plantation is:

Cane from 0 to 1 month old: Irrigate every 7 to 10 days.

Cane from 1 to 6 months old: Irrigate every 12 days.

Cane from 6 to 12 months old: Irrigate every 15 days.

Cane from 12 to 18 months old: Irrigate every 18 days.

Cane from 18 months to maturity: Irrigate every 20-25 days.

Cease irrigation from one to three months before harvest.

Irrigation frequency at the Plantation is guided by soil moisture samples collected weekly from each field of the Plantation. The field capacity of each soil type has been determined by standards developed by the U. S. Department of Agriculture, and the soil moisture available to the plant is reported for each locality in terms of acre inches of water available and the number of days interval required to replenish the supply. [135]

For the crop years 1933-1945 inclusive, the ratio of sugar produced to million gallons of water used for irrigation at the Plantation was as follows:

Crop Year	Tons Sugar Produced	Million Gallons Water Applied	Tons Sugar Per M.G. Water
1933	55,473	29,588	1.87
1934	55,669	31,454	1.77
1935	50,580	25,554	1.98
1936	53,855	29,068	1.85
1937	52,957	29,085	1.82
1938	46,853	29,478	1.59
1939	53,879	30,509	1.77
1940	58,212	30,548	1.90
1941	58,410	29,896	1.95
1942	52,967	24,665	2.15
1943	51,875	26,003	1.99
1944	54,684	29,658	1.84
1945	56,193	26,507	2.12

From 1899 to 1941, inclusive, tons sugars are commercial; from 1942, tons sugar are 96° U. S. Department of Agriculture.

13.

Harvesting

Harvesting is programmed at least one or two years in advance and the order of harvesting the various fields determined. In order to assure a continuous and balanced flow of cane to the mill, harvesting schedules must be properly balanced with planting and ratooning of succeeding crops, irrigation water distribution and the capacity of transportation facilities. In this way the harvesting, planting, ratooning, irrigating, transporting and milling operations can be evenly coordinated. Harvesting operations are conducted throughout the year except during the so-called "off-season"—a period of approximately three months when the mill is closed down for repairs as will hereinafter be described. Before any harvesting operations commence, field maps are prepared and the entire harvesting operation is planned out in every detail.

Sugar cane fields ready for harvesting are first burned over. Experience has shown that burning of the sugar cane results in insignificant losses in sugar content while efficiency in harvesting is greatly increased not only in removing the cane from the fields, but also through reduction of the amount of trash carried to the mill. Efficiency in operation of the transportation system as well as in the operation and maintenance of the mill is thereby effected. Trash percentage may run as high as 50 to 60 per cent in harvesting unburned cane, but in harvesting burned cane, trash percentage averages only 13 to

20 per cent. Trash is the term applied to anything other than millable cane, and includes dead cane, soil, foliage, cane stools, stones, tramp iron or any other foreign matter gathered up and sent to the mill in the course of harvesting operations.

An average of 10 to 15 acres of cane is burned at one time. Firebreaks approximately 15 feet wide are cut through the unburned cane by a modified 75-horsepower tractor bulldozer referred to as a bulldozer rake. This machine has a series of nine heavy steel teeth extending out in front of the machine and tears the cane stalks from the stools and pushes the cane off to the side into the upright cane. It requires one operator. A ground crew of four men work with the rake cutting cane stalks missed by the rake and also removing obstructions in the preparation of firebreaks. They also clear areas around telephone and power line poles, fences and pump houses for proper fire protection during cane burning. This crew also aids the rake operator in making minor repairs on the machine.

After the firebreaks are completed, a crew of six men proceeds under the field supervisor to set fires along the firebreaks. Backfire is a common practice as a safety measure. Burning of the cane may be performed at any time [137] during the day, including early mornings or late evenings depending upon the winds and weather conditions. The six-men crew performing this work is commonly referred to as the "burn cane crew". Four of the men in this crew make up the rake crew referred to above.

After the cane is burned, this rake and the four ground crewmen open up lines through the burned cane for the laying of portable track over which empty cane cars can be hauled from the main line of the Plantation railroad on a siding thereof into the field for loading and full cars can be hauled out of the field, to the main line for transportation to mill. A portable track plow or leveler then follows through the lines opened in the burned areas by the rake to make proper beds for the portable track. This equipment consists of two rails welded together to a point, then spreading out into a large trowel-shaped attachment mounted on the front of a 30-horsepower caterpillar tractor. A rail drag consisting of a number of rails welded together in a rectangular form 9 feet by 6 feet and attached by a chain to the rear of a tractor is pulled along the track lines for further leveling. The plow is used to break up the packed soil while the drag is used to fill or drag out excess soil. Ditches and holes are filled in. This portable track leveler is manned by one tractor operator. When the tractor is not required, the tractor operator leaves his machine and performs work, as required, with the portable track crew.

When the portable track beds have been prepared, rail cars loaded with sections of portable track are then drawn into the field by tractors. The portable track lifting machines lift the track sections from the loaded cars and place them in approximate position on the track bed. A crew [138] of three men follows, and, with the aid of a pinch bar, draw the

sections together, placing shoes on the connecting joints, flush end to end.

After the portable track line has been laid from the main line into the field, empty cars are hauled into position for loading. The number of cars needed for each portable track line is determined by the estimated tonnages of cane on the ground. If the cane tonnage is light, or cane is being picked up after the first loading, the cars are spaced to carry an average weight. If the tonnage is heavy, the cars are left coupled up the full length of such track line.

Where the main line passes through the field or is adjacent to the field the main line is utilized as a field track, harvested cane being loaded directly into cane cars spotted on the main line track.

The cane is loaded on the cars by caneloading machines. These machines are caterpillar cranes weighing approximately 23 tons equipped with a 40-foot boom and a finger-like grab which pulls or grabs the cane loose from its growing position and loads it directly into rail cars. The machine is operated by a 65-horsepower diesel engine. The cane grab operated by heavy steel cables consists of a number of tines capable of lifting approximately one to two tons of cane at one time. The machine moves on its caterpillar treads parallel with the portable track lines on which the cane cars have been placed. The Plantation owns seven of these caneloading machines. Three caneloading machines are normally assigned to each harvesting operation, there usually being two harvesting operations being

performed on the plantation simultaneously; the remaining machine acts as a spare. Each machine has one operator and four ground crewmen for each of two 8-hour operating shifts per day. The four ground crewmen for each [139] caneloading machine cut cane stubble and stack up loose cane falling from the grab. They give guiding signals to the operator, remove obstructions from the path of the machines and assist in minor repairs to the machine itself. The loading machine is sometimes called upon to assist in placing wrecked cars back on the field or main line tracks, and in such cases the ground crew constitutes the wrecking crew working with the operator. A service unit of one operator and a helper service all equipment each day. Lunch periods of the loading machine crews are staggered to permit servicing by the service unit without delaying the operation. Cane which is located in field corners, along fences, under transmission lines or which is otherwise difficult or impossible to reach with the cane loading machine, is bulldozed into reachable piles by the rake and subsequently loaded into cars by the caneloading machine.

The caneloading machines are equipped with generator units supplying power for the operation of floodlights on the boom and the cab. The entire machine and the ground surface around the machine have sufficient light so that the efficiency of the night loading operations is equivalent to that of day loading.

During the interim period between the termination of the day shift work and the beginning of the

night shift, service and repair men complete necessary repairs. During this time also the haul cane men, hereafter described, are able to remove the balance of the loaded cane cars out of the field, thereby permitting the locomotives to clear the side tracks and bring up empty cars for the night loading operations.

After cars are loaded by a cane loading machine, they are hauled from the field to the main line of the railroad (at the edge of the field) by tractors. Employees handling [140] this operation are called the haul cane crew. Preparatory to the movement of the loaded cane cars, one man or more of the haul cane crew using a cane knife cuts off some overlapping or protruding cane. Two haul cane tractors then move into position. One tractor is coupled directly to the rear car, enabling the operator to push or hold back the entire string of cars as required by the gradient of the track. The second tractor couples up alongside the cars in the front half of the string by means of a cable and is also in position to push or to hold back the cars. The ground crew then mans the brakes on the cars, releasing them to start loaded cars rolling, and thereafter releasing and applying brakes as required to eliminate full load weights on the tractors.

Carloads average 4.75 tons per car gross cane. Cane trains may consist of as many as eighty to ninety cars, depending upon the grade or the steepness of the field. Cane trains average sixty cars. Movement of field loads are supervised by the haul cane supervisor and the supervisor in charge of the

field, one taking charge of the front and the other the rear portion or half of the train load. They signal the hand brake operators and the tractor operators. The steady crew for this operation consists of the haul cane supervisor, two tractor operators and three brakemen on the day shift, with one tractor operator and two brakemen on the night shift. Tractors equipped with lights move empty cars into position for the night loading with the assistance of the brakemen.

A pickup crew consisting of two supervisors, two tractor operators, and twelve to sixteen ground crew men pick up all cane pieces along the track, throwing the cane into carts drawn by tractors. Full carts are dumped near the [141] loading machines. The crew also handcuts and loads cane from such parts of the field as the loading machine and bulldozer do not reach. When field pickup is completed they serve as ground crew men for a small diesel locomotive which tows empty cane cars along the main line from the field to the mill, picking up fallen cane. After the loading machines leave the harvested field, this crew cleans up remaining cane loading it into cane cars pulled by a tractor. The crew also serves as a general utility gang acting as replacements for other gangs or crews.

14.

Railroad Transportation

From the time the Plantation was organized, and continuing to the present, the Plantation has owned

and operated a narrow gauge railroad system. This railroad system is constructed, located and operated exclusively on the plantation. It hauls no cane or freight for anyone other than the Plantation. It is used predominantly by the Plantation for the purpose of hauling sugar cane from the fields of the plantation to the plantation mill. (Cane burned by accidental fires is sometimes hauled to the mill by truck if the tonnage is small.) It is also used to a much lesser extent to haul portable rails and other agricultural supplies and equipment from the plantation warehouses and shop yards to and from the fields. However, most of this latter type of hauling is handled by the plantation trucks operating over plantation field roads and also public roads.

The plantation railroad is also used for one other purpose at the present time. The Plantation has a spur track of approximately 3,000 feet in length running from its mill and warehouses and connecting with the railroad line of the O. R. & L. This spur track is used by the Plantation to deliver box [142] and tank cars loaded with sugar and molasses to the O. R. & L. and to receive incoming plantation supplies delivered to the Plantation by the O. R. & L. The O. R. & L. is now in a state of liquidation and will discontinue its operations during 1947. Thereafter the outgoing and incoming freight of the Plantation will be handled by an independently owned and operated trucking company.

Attached hereto and made a part hereof is a map

marked Exhibit "D" showing the location of the railroad lines composing the railroad network extending over the plantation. This railroad network consists of fifty-six miles of main line track and nine and thirty-four hundredths miles of portable track. Portable track laid in the fields is not shown on the map since it is installed only during the harvesting period and is then removed when harvesting is completed. Also omitted is a total of approximately twelve and one-half miles of line which is not permanent inasmuch as it is laid either bi-annually or annually on plantation roads.

Portable track laid in the field for harvesting operations lacks proper roadbed for the locomotives. The primary reason for the use of the portable track for harvesting is that permanent track cannot be laid in the fields because of interference which would otherwise result in planting and cultivating operations. During the short periods when such track in the fields is in use it is an integral part of the railroad system over which cane cars move directly from the fields to the mill.

The plantation railroad equipment is as follows: Six 25-ton steam locomotives, one 17-ton steam locomotive, one 12-ton steam locomotive, one 12-ton gasoline locomotive and one 14-ton diesel locomotive; two hundred steel cane [143] cars, measuring approximately 11 feet by 6 feet by 5 feet, and five hundred and twelve wooden cane cars measuring approximately 10 feet by 6 feet by 5 feet.

Main line switches to portable track, a few of

which are permanent, are installed at predetermined locations along the main line for movement of empty cane cars into the fields to be harvested and return of the loaded cars. The number of switches used per field depends on the proximity of the field to the main line, its size, shape and terrain.

Empty cane cars are moved into the harvesting fields as much as possible at night with the night shifts of railroad crews. This allows the night harvesting field crews to spot empties for night and day loading operations free from interferences of outgoing traffic. Only as time and traffic permit there is available room in the field, to meet a field exigency, or to meet demands of the mill for additional cane are empty cars moved into the harvesting fields during the daylight hours. Loaded cane cars are hauled from the field to a main line track by tractors and thence to the mill by steam or diesel locomotives during daylight hours only. On the return from the mill available empty cars are moved to some point near the harvesting field. In this manner flow of traffic in and out of the harvesting fields is primarily one-way traffic.

Empty cane cars are often pushed by the locomotives directly onto the portable track. Locomotives do not go onto the portable track, only to the field switch.

Loaded cane cars are moved part way onto the main line. The cars may be stationary or may be moving at the time connection to the locomotive is

made. At places where a siding is convenient, the loaded cars may be moved onto the siding by field tractors. [144]

Movement of trains to and from the mill is accomplished with a train crew of four men consisting of an engine driver, fireman, front and rear brakemen. Six to nine crews, with an average of seven, depending upon harvesting field locations, are required daily to handle cane and incoming and outgoing freight. The yard engine, which operates during the day only, handles the incoming and outgoing freight, and assists with spotting and segregating incoming cane cars. Maintenance of a steady flow of cane cars to the mill is also the responsibility of a yard crew.

A crew of a diesel engine locomotive driver and one man sprays the railroad rights-of-way with a herbicide approximately every two weeks. The operation requires four days.

Employees known as section men maintain the main line trackage and keep it in good repair.

Picking up of cane spilled along the railroad rights-of-way requires two to three days per week with one locomotive and an average of twenty cars. The Pickup crew consists of locomotive driver and one brakeman (diesel locomotive is used) together with a crew of pickup men from the field of between six and twelve men.

One hostler and one engine wiper wash the locomotives and steam boilers, oil and grease the loco-

motives, fire the steam locomotives preparatory to the day's operations and assist in minor repairs to locomotives. This service work is performed in the plantation roundhouse.

Ten crossing watchmen are used to protect the public at government road crossings. Between the hours of 10:00 p.m. and 6:00 a.m., train crews are responsible for flagging all government road crossings. One man is used to dry and [145] maintain a supply of dry sand for use by the locomotives. Another man is employed to keep the mill yard rights-of-way clean.

During the off season when cane is not being harvested, the section men are used in the repair and maintenance of main line trackage supplemented by approximately twelve brakemen and five firemen. Watchmen are used for cleaning and weeding the rights-of-way. Usually one engine driver, two firemen and three brakemen are assigned to assist the electricians on mill work primarily. One fireman and two brakemen are generally assigned to the welding shop for assisting in off season factory repairs and installation of new equipment. Two more brakemen are sometimes assigned to boiling house repair work. One yard engine crew is maintained during the off season. The crew consists of engine driver and brakemen for the diesel locomotive. Engine drivers, not otherwise used, assist in locomotive repairs.

15.

Field Road and Public Road Transportation

The size of the plantation has necessitated the construction and maintenance by the Plantation of a network of field roads for the transportation of labor, field supplies and equipment throughout the plantation.

This network of roads is shown on the transportation map marked Exhibit "D." The main roads, as shown on this Exhibit, are publicly owned roads, paved and maintained by the City and County of Honolulu, or by the Territory of Hawaii.

Most Plantation-owned roads are dirt surface roads, maintained by the Plantation with its own diesel powered grader. A few roads have a top dressing of either sand, coral or crushed rock. Some Plantation-owned roads are paved. [146]

These roads are used to transport plantation labor from the main plantation village situated around the plantation buildings and yard area out to the fields. Cement and other supplies are loaded hauled from outlying villages to various fields. All this labor is hauled by truck.

Field supplies, such as concrete irrigation flumes, irrigation flume putty, fertilizer, cement, etc., are hauled from the plantation warehouses and yard area out to the various fields by 1½-ton to 7½-ton gasoline driven trucks. At times the plantation railroad may be used to haul some of the above supplies, especially when certain parts of the fields

are more easily reached by railroad. Most of the time the fertilizer is loaded by hand directly from O. R. & L. box cars onto trucks and then hauled to the fields. Cement and other supplies are loaded from warehouses by hand onto trucks. Concrete products, such as irrigation flumes, pipes, etc., are loaded from the plantation-owned and operated concrete products yard onto trucks by hand.

Herbicides are hauled in their original containers from a Plantation warehouse to nearby mixing station by trucks. After the herbicide is mixed, it is put into 2-gallon containers and trucked out to the fields in a one-ton truck. Tank trucks haul mixed diluted herbicide solution out and spray this on weeds located along roadsides, ditches, etc.

Cane seed is trucked on 2½-ton to 7½-ton trucks from the field in which the seed is cut into the fields where it is to be planted. This seed is bagged and loaded by hand.

All field mechanical equipment is hauled from field to field or to the shops on rubber-tired trailers drawn by trucks or a rubber-tired tractor. Heavy equipment, such as harvesting machines, plow tractors, cane rakes, bulldozers, [147] etc., is hauled on a large 25-ton, 6-wheeled trailer drawn by a 98-horsepower rubber-tired tractor. Light equipment, such as ratooning tractors and other light tractors, is hauled on a 2-wheel trailer drawn by a 2½-ton truck.

Fuel and servicing equipment for field power operated equipment, such as harvesting machines,

tractors, air compressors, etc., is hauled out in tank trucks. Fuel for the two steam irrigation pumps is hauled in O. R. & L. tank cars from the O. R. & L. siding to the pumps by Plantation locomotives on the Plantation railroad.

Sand is hauled from a Plantation-owned sand area in Waimea Bay to various parts of the plantation in 2½ to 7½-ton trucks. The sand is loaded mainly by crane and clamshell bucket, but is sometimes loaded by hand.

At times when there is a shortage of certain supplies at the plantation, trucks may go to Honolulu or any part of the island to obtain them.

16.

Cleaning Cane

Locomotives deliver the loaded cane cars to the mill yard to be moved up to the cane cleaning plant where the cane is washed in preparation for conveyance into the mill. Locomotives bringing in cane cars may move the cars directly into position for unloading into the cane cleaning plant, if all cane cars delivered to the mill on the preceding day have been emptied during the night operations of the mill. One of the mill yard track lines leads directly into the cane cleaning plant and accommodates approximately one hundred loaded cars. An adjacent track line receives empty cars from the cane cleaning plant and accommodates about sixty cars. During the night, loaded cars are moved up from the track [148] sidings by a mill yard en-

gine, since additional loaded cane cars are not delivered to the mill from the field during the night.

Time elapsing between the loading of the cars in the field and the unloading into the cane cleaning plant may vary from four to sixteen hours. Time elapsing between the arrival of cane from the field to the mill yard and the unloading into the cane cleaning plant may vary from a few minutes to an hour during the morning. Cane delivered to the mill yard in the afternoon may not be unloaded until the following morning.

Cane once cut or burned undergoes an inversion process involving a chemical reaction of the sucrose, the sugar content of the cane, which transforms it into undesirable compounds. This reaction, commencing with burning and harvesting, continues with increased acceleration until the juice is chemically treated or concentrated in the form of syrup. Hold over of cane in cars in the mill yard will result in a substantial inversion factor. For this reason, harvesting activities and mill activities are closely coordinated to reduce to a minimum any hold over of the cane before crushing. Ideal conditions are those in which there is a complete continuity of movement of the cut cane, permitting direct and immediate delivery from the harvest field to the cane cleaning plant for cleaning preparatory to crushing.

The following table shows the progressive rate of deterioration of burned cane, whether standing

or cut, when not milled and the resulting percentages of sugar losses: [149]

Days since burning or cutting	1	2	3	4	5
Burned, left standing	3.05	6.09	9.14	12.18	15.23
Burned, cut at once.....	2.84	5.69	8.53	11.38	14.22
Days since burning or cutting	6	7	8	9	10
Burned, left standing.....	18.03	20.83	23.63	26.43	29.23
Burned, cut at once.....	17.43	20.64	23.84	27.05	30.26

The purpose of the cane cleaning plant is to remove as much trash as is mechanically possible. Tramp iron and rocks passing into the mill rollers result in serious damage to the rollers and equipment, requiring shut downs for repairs.

Loaded cane cars are pulled into the cane cleaning plant by means of a heavy steel fork that engages the end car and the car line is pulled forward one car length at a time by means of an electric gear motor, sprocket and chain. As the string of loaded cars is hauled into the cane cleaning plant, each car is uncoupled as it goes onto a small railroad scale. Each loaded cane car is supplied with a ticket in a small metal pocket on the end of the car, the ticket having been placed there in the field at the time of loading. These tickets have the car numbers marked on them, together with information as to the field, the time and date the cane was burned, the date of loading and the cane variety. The scale man removes the ticket from each car and enters the weight while the car is on the scale. These tickets are collected and totaled hourly and are an important step in mill control. No washing or trash removal takes place prior to weighing the cars of cane.

After scaling a loaded car, the car is pushed onto the car dumper by the next car entering the scale. When it [150] has come to a stop in the center of the dumper table with the front car axle against a stop, the cane cleaning plant operator clamps it down to the dumper table by means of electrically operated clamps which engage the car. The operator then unhooks the car side chains that hold the cane in the car. The electrically operated dumper table is tilted to an angle of sixty degrees and the cane slides out of the side of the car and into the tumbling conveyor, after which the operator lowers the dumper. The empty car on the dumper table is displaced by the next loaded car coming off the scale and rolls onto an electrically operated transfer car which carries it across to the empty car line. It is then pushed onto the empty line by a motor operated pusher and is manually coupled to the end car in the empty string, the car couplers being of the **link and pin type**.

The loaded car line is replenished at about two hour intervals and empty cars are hauled away at one to two-hour intervals.

The cleaning process is divided into three parts and starts in a tumbling conveyor. First, the cane bundle is tumbled on a steep carrier sixteen feet wide and about fifty feet long, consisting of pipes attached to a conveyor chain with one-half inch spaces between the pipes. Cleats are attached to the pipes to facilitate carrying the cane up the steep incline of this carrier. Stationary side plates prevent the cane from falling off the sides of the con-

veyor. The conveyor moves at a maximum rate of 180 feet per minute, but may be operated at any speed below this since it is driven by a variable speed motor. The cane comes off the cars in a tangled mass and the tumbling conveyor breaks up the mass so that the cane is carried up the steep incline in a thin [151] layer. Considerable amounts of dirt and fine trash fall through the carrier onto a drag conveyor below. When rocks are present in the cane, the carrier is stopped after they have been shaken out of the cane mass and are rolled by hand off the lower end into a rock conveyor below. A gate at the lower end of the carrier is raised by means of an electric hoist during this operation.

As the cane leaves the upper end of the tumbling conveyor, it is dropped onto the lower end of a wash carrier. This wash carrier is sixteen feet wide and twenty-five feet long. Water is sprayed on the cane at the rate of about 2,000 gallons per minute as it is carried under three sets of nozzles placed over the upper portion of the carrier. This water washes the cane directly under the nozzles and cascades down through the cane approaching the nozzles. In this way, most of the mud and dirt is removed from the cane. This carrier is driven by the tumbling conveyor motor.

When the washed cane leaves the wash carrier, it is skidded down steel plates to leaf stripping rolls. There are twenty-four pairs of these rolls which are in contract and turn toward each other. They are driven by six electric 25-horsepower gear motors and remove most of the leaves and trash

from the cane as the cane slides over them. Very little cane is pulled through. Leaves and trash thus removed fall into a flume underneath the rolls, and this material is flumed away.

After leaving the leaf stripping rolls, the cane falls into the mill carrier, which transports it to the crushing plant. When rocky fields are being harvested, rocks find they way into this carrier and a watchman is kept at this station to watch for and remove them. The lower end of [152] the mill carrier is in a cement lined pit six feet wide. During bad weather when the cane is unusually dirty, water is sprayed on the cane in the lower portion of the carrier and the dirty water is pumped out of the pit.

Most of the mud and dirt from the cane is flumed with the wash water to low fields near the mill. Leaves and trash, removed by the stripping rolls, are flumed to a nearby motor driven three-roll mill where the material is ground fine and then dumped into the wash water flume for disposal.

Seven men per shift are required in the cane cleaning plant. One man uncouples the loaded cars as they come onto the cane scale. Another scales the cars. A third operates the electrical control board that activates the car haul, the car dumper, the empty car pusher, the rock and dirt carriers, the tumbling conveyor and the wash carrier. A fourth couples up empty cars. The uncouple man, the scale man and the couple-up man assist in removing any cane left on the cars after they have been dumped and in removing stones and foreign

material from the tumbling conveyor. A fifth man is stationed at the wash carrier to see that no cane jams occur and to remove pieces of cane from the small drag carrier that screens the dirty wash water. A sixth man serves as rock watchman on the mill carrier. The seventh man drives a rock and dirt disposal truck.

In addition to the seven men per shift in the cleaning plant, two men are required to work, on the day shift only, in the disposal fields, spreading the flumed ground trash and mud.

17

Chopping and Crushing Cane

Extraction of juice from the cane stalks is possible [153] only when the cane cells and tissues are ruptured. This rupturing action can be advanced by shredding or chopping the cane with knives, and thereafter completing the extraction process by compression exercised between grinding rollers.

After the cane has passed through the cane cleaning plant, it is carried on a six-foot wide carrier to the crushing plant. Before entering the crusher room, the cane passes under a set of sixty-eight revolving knives bolted to discs on a shaft set across the carrier. The shaft is driven by a 125-horsepower motor. These knives serve to level the blanket of cane as it is carried up to the crusher. A similar set of knives is located at the top of the carrier. These knives chop up the cane as it leaves the carrier. From the mill carrier the chopped cane is dropped down a chute into the crusher rolls.

The crushing operation consists of a cane crusher and five mills arranged in tandem and extended about 136 feet.

The crusher consists of two rolls, 78 inches wide and 39 inches in diameter. The five mills consist of three rolls each which are also 78 inches wide and have a diameter slightly less than the diameter of the rolls in the crusher. The three rolls in each mill are arranged horizontally with two rolls below and one roll fitting down on top. The term "mill" is here used to refer to each of the five units of three rolls. As so used, the term should not be confused with its common usage in referring to the building in which the entire processing operation is conducted. The term "crusher" is used to refer to the unit of two rolls which crush the cane and pass it on to the mills.

The purpose of the rolls is to press the fibre and remove the juice contained therein. The fibre passing through [154] the rolls is referred to as bagasse. One hundred percent extraction of the juice is impossible due in part to the capillarity of the bagasse. Normally, 40 to 60 per cent extraction is achieved in the crusher rolls. The purpose of the succeeding five mills is to extract the remaining juices.

The crusher rolls are set horizontally with a 1 inch opening between the rolls. Bearings on the top roll are so arranged as to permit the top roll to rise slightly as the cane goes through. At the same time, hydraulic jacks are set in such a manner as to deliver the desired pressure on the crushed cane

as it goes through. Flow of cane to the crusher is controlled by regulating the speed of the mill carrier. Juice squeezed out of the cane is collected in a sloped copper juice pan set below the crusher and the first mill rolls. This juice flows through a screen and is flumed to a juice tank from which it is pumped to the boiling room.

The crushed cane passing between the crusher rolls is discharged directly into the first mill. Clearance between the front or leading bottom roll and the top roll in this mill is three-eighths of an inch. Clearance between the top roll and the back or discharge roll is one-fourth of an inch. Juice extracted in the first mill is collected in the same pan that receives the crusher juice. Approximately 70 per cent of the normal juice in the cane is extracted in the crusher and the first mill.

The succeeding four mills are similar to the first mill, except that the rolls are set slightly closer together.

The crushed or ground cane is conveyed from one mill to the succeeding mills by means of an inclined closed chute. Before entering the last mill, hot water is applied to the ground cane. This resulting solution is squeezed out [155] in the last mill and is collected in a conical copper pan under the mill, from which it is pumped to juice spreaders between the previous mills where it is spread on the crushed cane and again passes through the other mills, ultimately being collected in the one juice tank from which it is then pumped to the boiling house.

Approximately 96 to 97 per cent of the sucrose in the cane is removed in the milling process.

Moisture content of the bagasse averages 45 per cent. Fuel value is roughly equivalent to saw dust. All of the bagasse is burned under the boilers to generate steam for the processing of the cane and to produce power for the various integrated operations of the Plantation as will be hereinafter explained. The bagasse is carried by an inclined drag carrier from the No. 5 mill to an overhead distributing conveyor in the fire room.

The mill and crusher rolls are driven by three steam engines totaling 1,400 horsepower. Since the crusher rolls turn at a different speed from the mill rolls while engines operate at a higher speed, a system of heavy gears supplies the proper reductions in power.

Eight motor driven centrifugal juice pumps are installed to pump the juices through the crushing and milling process and also to pump the mixed juice to the boiling room.

Seven men per shift work in the crushing plant. Three engine tenders operate the three engines providing power for the crusher and the mills. By regulating the speed of the engines, the engine tenders can maintain an even feed through the crusher and mills in coordination with the feeding of the cane from the cane cleaning plant. One engine tender is in charge of the crusher and the mills and regulates the [156] rate of operation. The second engine tender is responsible for repairs in the cane cleaning plant. The third tender is

responsible for lubrication of the mill gear system. The fourth man in the crew acts as mill feeder, regulating the flow of cane to the crusher. The fifth man is the mill oiler, responsible for the oiling and greasing of the crusher and mill mechanisms, and also performs the oiling and greasing of the cane cleaning plant. A sixth man is responsible for maintaining the pressures exerted upon the top mill rolls. He also watches the juice pans under the mill to prevent trash clogging and operates the juice pumps. The seventh man is a utility man, taking assignments as directed by the shift engineer.

In case of equipment failures, the engine tenders, assisted by other crew members, perform repair work under the direction of the shift engineers. Employees in the welding shop, machine shop and blacksmith shop, however, are called upon to do most of the repair work requiring welding or machining. All repair work required during processing operations to restart equipment must be handled immediately to avoid serious sugar losses in burned and harvested cane and in cane and cane juices being processed and to avoid costly mill cleaning operations.

18

Clarifying and Crystallizing

Clarifying of the juices extracted from the cane in the crusher and mills and the crystallizing into the raw sugar crystals are performed in the boiling house.

The raw cane juice from the crusher and mills is discharged from a flume into juice scales and is there weighed.

The juice is emptied from the scales into a receiving [157] tank underneath the scales. Milk of lime solution is introduced into the juice and reacts upon the phosphoric acid to form a precipitate which permits the removal of the foreign matter not in solution.

The mixture of juice and milk of lime is pumped from the receiving tank through a set of four horizontal tubular heaters which function in sets of two each.

The limed, heated juice is piped to the clarifier. This consists of a series of five trays, one above the other, in a closed tank. Scraper arms revolve slowly in this clarifier and the precipitated "mud" settles in the trays and is scraped to the side to flow to the bottom of the clarifier tank. The clean juice is drawn off through a pipe from each compartment formed by the series of trays. The clarifier, with its five trays, measures 28 feet in diameter and 30 feet in height.

The "mud" in the bottom of the clarifier is treated in a side process since it contains considerable sucrose and must be filtered to enable recovery. It is therefore pumped to a filter station. There it is first passed through a mixing tank where fine bagasse, pneumatically conveyed from the fire room, is added to the "mud" as a filter aid. Three filters, consisting of rotating drums and acting on the vacuum principle, rotate in the solution

of "mud" and bagasse, picking up a so-called "mud" cake on the surface of the drum which is then carried through several hot water sprays that wash out a large amount of sucrose, leaving a waste residue which is disposed of by means of a conveyor operating to a flume where it is washed out to the mill waste disposal yard. Washings from the filter, although not clear enough to be added to the clarified juice, are pumped to the mixed juice [158] tank for reprocessing as a part of the initial stage described above.

After passing through the clarifier, the clean juice flows to a supply tank from which it is pumped to the evaporator station. By evaporating out the water which holds the sucrose in solution, the juice of the cane is concentrated. This permits crystallization of the sucrose in the form of raw sugar. This concentration, performed after the elimination of as many impurities as possible in the clarifier, is begun in the evaporators, where the major water content is removed. The second stage, that which takes place in the vacuum pane, is the crystallization stage proper.

In the evaporation stage, the juice is pumped first to the pre-evaporator where low pressure steam is introduced in copper tubes jutting up into the liquid juice contained in the pre-evaporator. This causes the juice to boil and steam vapor is produced, collecting in the top of the pre-evaporator from which it is withdrawn for heating the vacuum pans (the secondary stage referred to above). The juice remaining in the pre-evaporator

flows down to the bottom and then moves into the first cell of the quintuple series of the evaporator, where the same process is repeated, and so on through the remaining four cells of the unit, the repeated process in each cell resulting in further evaporation. Each of the quintuple cells of the evaporator is heated by the vapors withdrawn from the preceding cell.

After passing through the evaporator, the juice, now reduced to a syrup, is pumped to supply tanks at the vacuum pan station. Here the formation of sugar crystals occurs. There are five vacuum pans, each operated as an individual unit. They measure 10 to 14 feet in diameter and [159] 15 feet in height. Each pan is capable of making thirty-five tons of raw sugar at a time. The vacuum pans are heated either by the hot vapors from the pre-evaporator or by low-pressure steam from the fire room. Removal of vapors in the process is accomplished by a central vacuum pump which also supplies the evaporators.

High grade and low grade raw sugar are produced. High grade raw sugar is always the final product while the low grade raw sugar is reprocessed to make **high grade sugar**.

Low grade raw sugar is drawn into one of the vacuum pans, into which the sugar syrup is then fed until the pan is full. This process requires approximately 2½ to 3½ hours. During this time the mixture of low grade raw sugar and syrup is boiling and the density is maintained at an optimum point which will allow the original sugar crystal to

grow in size but not form any additional crystals. This condition is determined by the operator who removes and inspects small samples from time to time. After 10 to 12 hours, the completed batch, consisting of sugar crystals and molasses, is dropped from the pan into a mixing tank from which it is fed into centrifugal machines that separate the sugar from the molasses.

The molasses is then pumped back into the vacuum pans where it is mixed with syrup. The same process described above is then performed with this mixture to produce another grade of raw sugar, which is also classed as high grade, but not as high as the grade above described. The molasses resulting in this operation is lower in sucrose content. This molasses is the supply for obtaining low grade raw sugar.

Formation of low grade raw sugar is accomplished by the same boiling process, differing only from the making of high grade raw sugar in that no sugar crystals are introduced [160] as a foundation but the molasses is concentrated to the point where spontaneous crystallization occurs. The process is then checked, and additional molasses is gradually fed into the pan at a controlled rate which will result in the growth of the crystals formed rather than formation of additional crystals. This feeding process continues for six to ten hours. This mixture is then dropped into an open cylindrical tank having a capacity of 850 cubic feet. These tanks are called crystallizers. There are six-

teen in use. After two to three days in process the material is pumped into a mixing tank from which it is fed into low grade centrifugals.

The centrifugal station consists of nineteen low grade and seven high grade centrifugal machines. These machines consist of rotary baskets suspended on a spindle and lined with perforated copper screen. They revolve at a high rate of speed by a direct connected electric motor, and the centrifugal force throws out the liquid material into a curb from which it is flumed to a storage tank while the sugar crystals remain on the screen. They are removed by a mechanical scraper moving vertically along the surface of the screen. The low grade centrifugal machine operates for a period from 45 to 75 minutes depending upon the quality and amounts of material on hand. It is then stopped, the sugar removed, and the cycle repeated.

Since no further extraction of sugar is possible, the low grade molasses remaining is an end by-product. During 1946, an average of 460 tons of molasses a week was obtained which amounted to about 3.4 per cent of the weight of the net cane processed or approximately .26 ton of molasses per ton of raw sugar. This molasses is pumped to a storage tank with a capacity of 1,300 tons and from this storage tank it is [161] repumped into railroad tank cars for shipment to and sale in the continental United States. A very small percentage is sold locally for cattle feed. The percentage so sold averages 500 to 600 tons per year.

Low grade sugar removed from the centrifugals is mixed with water and pumped to the vacuum pans for use in the process described above.

The high grade sugar centrifugals are similar to the low grade machines except that they are driven by a high pressure water jet and the drying cycle is only 3 to 4 minutes. The dried sugar is removed from the centrifugals to an adjoining sugar bin preliminary to bagging. The boiling house employs a total personnel of 45 including the boiling house superintendent and three shift foremen.

19.

Sugar Bagging and Shipping

The raw sugar flows from the bin through an automatic scale which weighs out a 100-pound load, and dumps it into a chute at the neck of which the operator has attached a hemp bag. The entire operation occurs in timed sequences automatically upon the closing of a switch. The released bag of sugar is carried out by a conveyor through a sewing machine head where the bag opening is sewn, and the bagged sugar continues on the conveyor to a railroad car for loading and shipment to the continental United States or to the sugar warehouse on the plantation for temporary storage.

There are two sets of scales, baggers and sewing machines with one operator each. Each set handles about seven bags of sugar a minute. At present time the bagging station is operated for two 8-hour shifts with two operators on one shift and one

operator on the second shift. An average [162] of 275 to 300 tons per day is bagged at this station. This represents the average daily raw sugar production of the mill.

20.

Work Schedules of Mill Employees

Production in the mill operations is keyed basically to a six-day week with continuous and around-the-clock operations, the mill stopping the grinding of cane at 2:00 p.m. on Saturdays and starting up at 2:00 p.m. on Sundays. The 24-hour day is divided into three 8-hour shifts running from 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., 10:00 p.m. to 6:00 a.m.

21.

Week-End Repair of Mill

The weekly 24-hour shutdown period of mill is necessary to perform cleaning and repair operations. The filter screens must be cleaned out with a traveling steam jet which takes about 45 minutes per filter and is performed by the regular shift operator. The juice heaters must be opened up, the tubes steamed for half an hour, and then brushed to remove the loose scale. Considerable scale forms in the tubes of the evaporators and after the last juice is removed on Saturday afternoon the effect is washed out with water and a continuous spray of caustic soda solution is applied for 5 to 6 hours. Then muriatic acid is added and boiled, the cells

cleaned out with water and opened in preparation for the scraping and brushing operations. The vacuum pans are also boiled out with a weak acid solution and the tubes brushed manually whenever necessary. The oilers and repairmen also do the necessary work on the various pieces of equipment that can only be accomplished while they are idle.

Over the week-end two shift crews clean up and make such repairs as are necessary in the crushing plant and cane cleaning plant. Engine tenders are responsible for mechanical jobs in such plants. They are assisted by the remaining crusher room men and the operators and scalemen from the cane cleaning plant. Mill oilers are occupied in greasing up the equipment in the cane cleaning plant.

While, in general, repairs are performed during the week-end, every effort is made to anticipate week-end requirements and the various shops located near the mill perform as much work as possible while the mill is in operation.

22.

No Non-Plantation Cane Processed by Mill

All of the cane processed by the Plantation mill is produced on the plantation and by the Plantation.

23.

Sugar Warehousing

Under normal operating conditions the bagged sugar after leaving the mill is loaded directly into

the railroad box cars for shipment. Due to the limited number of cars and storage space at the port wharves and occasional interruptions in ship schedules, the sugar may be stored temporarily from time to time in the plantation sugar warehouse. But even this sugar is normally removed within a month's time and the warehouse is usually empty at the end of the grinding season. During the last five year period there were two years in which no sugar was stored in the plantation warehouse. Raw sugar is never stored at the plantation because of price, market or other economic considerations. The most efficient and profitable operations call for shipment to mainland refineries immediately upon production. [164]

When stored in the sugar warehouse, the sugar bags are carried by a long belt conveyor from the room in the mill where they are weighed and filled to one end of the sugar warehouse building. From here they drop in a chute to a series of portable conveyors which carry them to any part of the building where they are stacked in piles. Additional help is needed in performing this piling operation and two men from the field force are temporarily transferred to assist the regular pilers. To remove the sugar bags to rail cars for shipment a crew of six or seven men is obtained from the field as the regular men are usually occupied in handling the current production.

In addition to sugar, all of the empty sugar bags, in bales of one thousand to six hundred bags each,

are stored in the warehouse. These are charged out as they are removed to the mill for use. Due to a shortage of warehouse space, fertilizer is also stored in bags in this building from time to time.

24.

Fire Room and Power Production

In extracting the juices from the sugar cane, one of the by-products is the cane fibre from the cane stalks, which is referred to as bagasse. When dried, one ton of bagasse has a fuel value approximately equivalent to two barrels of fuel oil. As indicated above, the extraction of the juices from the cane fibre and the processing of sugar cane into raw sugar require large amounts of power for the operation of the prime movers, conveyors and pumps. It is therefore traditional in sugar cane processing to utilize the bagasse as an economical source of fuel for the production of power for use in performing the various processing operations. [165] An average of approximately three thousand tons of bagasse is produced each week when the mill is operating at full capacity. Fuel is also essential in the processing operations for the production of steam for heating and evaporating of the juices and the crystallization of the sugar. Fuel is also used to produce steam for the generation of electric power needed in the various operations of the plantation, as will be hereinafter more fully described. If the bagasse were disposed of as waste, other fuel would have to be obtained in order to obtain steam.

If the bagasse were not utilized as fuel, a difficult disposal problem would be presented because of its bulkiness and the large volume involved. Bagasse produced by the plantation has no marketable value.

The Plantation attempts to save and store enough bagasse during the week to meet the requirements for operating the boiler furnaces on the week-ends when cane is not being ground. Sufficient quantities of bagasse are not always available to satisfy the fuel requirements of the mill. This condition occurs during periods of breakdown of machinery and during periods of wet weather when harvesting and processing operations are slowed down by reason of heavy trash contents. The boiler furnaces are therefore equipped to burn fuel oil which is stored in a concrete fuel oil tank located in the mill yard near the fire room for convenience of supply.

The fire room of the mill is located adjacent to the crusher room. It houses seven water tube boilers. Boiler feed pumps and two condensate pumps are housed at one end of the fire room and are used to supply water. A condensate tank is located in the mill yard area adjacent to the fire room. Fuel oil pumps and a fuel oil heater are also located [166] in the fire room area for use when fuel oil is being burned.

Furnaces used in burning bagasse are set in front of the boilers in the fire room. The bagasse is fed into the furnaces through chutes connecting with the bagasse conveyor from the crushing room.

Fuel oil burners are installed in the back of the boilers and the oil is burned directly below the boiler tubes.

Steam is generated at an average rate of approximately 150,000 pounds per hour when the mill is operating at a maximum capacity. Steam lines lead from the fire room to the crusher room where steam is used to drive the mill engines which in turn drive the crusher rolls and the mill rolls. Exhaust steam from these engines is piped to the boiling house for direct use in the processing operations.

Another steam line from the fire room leads to the power room for generation of electric power by a turbo-generator and two steam engine driven generators. Steam enters the turbine at a pressure point of approximately 150 pounds and after conversion of the initial energy in the steam into electrical energy by the generator, bled steam, now carrying a pressure of approximately 10 pounds, is piped to the boiling house for use as process steam supplementing the steam exhausted from the mill engines. Steam is also exhausted from the engine driven generators into the process steam line in an identical manner with the exhaust steam from the mill engines.

The automatic bleeder valve on the turbo-generator is the main control point for maintaining the pressure in the process steam line at a given amount. A drop in pressure in the process line will indicate insufficient process steam [167] for the boiling house requirements, in which case the tur-

bine bleeder valve opens automatically, thereby increasing the flow of steam to the process line to maintain the necessary pressure for boiling house operations. On the other hand, if the pressure in the process line increases above normal, the bleeder valve then closes proportionately, thereby restricting the flow of steam to the process line and returning the process line pressure to normal requirements.

Another steam line from the fire room supplies steam to the steam driven auxiliary units in the boiling house, and still another leads to the boiler pump room to operate the boiler feed pumps.

Returning condensate from the power room and boiling house is heated, together with any required make up water by exhaust steam from the boiler feed pump engines. If there is an excess supply of returning condensate, this flows into the boiler feed water tank outside the fire room.

Seven men per shift work in the fire room with the addition of two boiler cleaners on the day shift. The water tender is the fire room foreman and is under the supervision of the shift engineer. He directs the fire room men and also sees that the water in the boilers is maintained at the proper level at all times and that the feed water regulators are working properly. It is his duty to blow down the boilers at intervals to keep the solids in the boiler water below safe operating limits. The fire room oiler assists the water tender, takes care of the pumps, oils the carriers and bagasse feeders,

operates oil burners if required and assists in shoveling bagasse when the mill stops. Two firemen regulate the flow of bagasse to the fires and regulate draft with dampers to maintain steam pressure. They also watch the water [168] columns on the boilers. Three ash and trash men clean the furnaces, distribute bagasse in the bagasse storage space as required and shovel trash from the stock pile into the reclaiming conveyor when the mill is stopped. Two boiler cleaners work on the day shift only. Besides cleaning boilers they take care of minor repair work in the fire room. Except for a few pumps, there is no duplicate equipment. Generally three shifts are used in the fire room for week-end repairs.

25.

Generation and Distribution of Electric Power

As set forth before in connection with the production of steam power in the fire room, the electric power generating equipment of the Plantation is located in the mill. It consists of one 6600-volt generator driven by a steam turbine and two 440-volt generators driven by reciprocating steam engines.⁴ The electric power generated by this machinery is generated from steam produced in the boilers, which passes through the generating machinery and is then conveyed through steam lines

⁴ The Plantation also has a hydro-electric plant, known as the Kemoo Plant, located on the upper side of the Plantation. This plant has not been operating since 1943 and is completely shut down for an indefinite period.

for use in the processing operations in the boiling room.

Electric power generated is not sufficient to supply the needs of the Plantation. For the purpose of supplementing the power generated, electric power is purchased from the Hawaiian Electric Company, Limited, an independently owned and operated public utility, on the Island of Oahu. During the period 1941-1945 inclusive, power generated in the Plantation system represented 64 6/10 per cent of the amount [169] consumed. The remaining 35 4/10 per cent was purchased from the Hawaiian Electric Company. The following table represents a breakdown of this power generated and purchased:

POWER GENERATED AND PURCHASED

(Kilowatt-Hours)

Year	Power Generated	Net Purchased	Total
1941	13,920,751	6,298,328	20,219,079
1942	12,107,338	4,252,311	16,359,649
1943	11,910,190	6,842,133	18,752,323
1944	13,362,393	8,540,695	21,903,088
1945	13,087,887	9,236,272	22,324,159
Average	12,877,712	7,033,948	19,911,659
Percentage			
Average	64.6%	35.4%	100%

The power generated and purchased by the Plantation is distributed to the mill, field irrigation pumps, repair shops and related buildings, domestic water pumps, plantation houses and services and to several small non-plantation users living in the plantation community who, because of their location, cannot be conveniently served from the present transmission lines of the Hawaiian Electric Com-

pany. The electric transmission lines representing the distribution system of both the Plantation and the Hawaiian Electric are shown on the map attached hereto as Exhibit "E".

For the years 1941-1945 inclusive, the use of the electric energy distributed by the Plantation in the terms of percentages was divided as follows:

For mill, shops and related buildings.....	36.3%
For plantation irrigation pumps.....	47.4%
For plantation domestic water pumps.....	3.9%
For Sundry use	12.4%

The power distributed for sundry use includes power distributed to plantation houses for lighting, electric ranges, water heaters and other electrical appliances; to street lighting, club houses, gymnasiums, playgrounds, bath houses, [170] plantation store and branches, and a hospital; and to several non-plantation retail stores and service establishments, churches and houses all situated in the general plantation community. The total amount of power used by all non-plantation persons was less than 1% of the total power distributed by the Plantation for the years 1941-1945 inclusive. The various percentages of use set forth for such years are substantially true today except that the distribution to non-plantation users in the community is now approximately $\frac{1}{2}$ of 1% of the total power distributed by the Plantation because these users are constantly being absorbed by the Hawaiian Electric as it extends its transmission lines. None of the electric power distributed to non-plantation users by the Plantation is used for or in connection with the production of goods for interstate commerce, nor is

it used to operate any instrumentality of interstate commerce nor is it transmitted into interstate commerce.

As indicated before, for the purpose of obtaining additional power from the Hawaiian Electric Company, the Plantation system is tied into the former system throughout the year. As a consequence, on rare and infrequent occasions the Plantation will feed back power into the Hawaiian Electric Company lines. The feed back into the Hawaiian Electric lines occurs when the electrical load of the Plantation is small and the steam is great. Under these conditions the Plantation may generate more power than it uses. This situation may occur on week-ends when the mill is closed down and the mill requirements are slight or completely absent or it may occur at periods when some field irrigation pumps have shut down. Power is not fed back to the Hawaiian Electric lines for the purpose of selling power but only because it [171] is a necessary, convenient and economical method of disposing of the excess power. To avoid feeding back power in the situation described would be costly and impractical as it would either require a complete resetting of the plantation generators to produce less power (which would necessitate the closing down of the power plant) or it would require expensive machinery which would synchronize the generation requirements with the required power load of the Plantation.

The times of the feed back are infrequent, irregu-

lar and unpredictable and the Hawaiian Electric has no need for such power in this area.

A chart showing the total amount of power purchased from Hawaiian Electric and the total credit allowances for feed back in dollar volume is set forth for the years 1941 to August 31, 1946 inclusive.

Year	Total Dollar Volume of Power Purchased from H. E. Co.	Total Dollar Credit Allowances for Feed Back from H. E. Co.
1941	\$ 65,320.42	\$ 602.12
1942	51,965.41	1,286.88
1943	74,362.23	2,377.54
1944	92,129.41	1,023.36
1945	106,339.01	288.20
1946 Aug. 31	56,163.51	431.63
	<hr/> \$446,279.99	<hr/> \$6,009.73

Operation of the mill power plant requires one operator and one auxiliary tender per shift. One mill maintenance electrician is needed for the shift from 2:00 p.m. to 10:00 p.m. and one for the shift from 10:00 p.m. to 6:00 a.m. [172] Electricians from the electric shop also are on call for necessary repairs. During the off season the turbines, steam engines, generators, motors and auxiliary equipment in the mill are overhauled and reconditioned and during such period the Plantation generates no electric power but purchases all of the power which it needs from the Hawaiian Electric Company.

26.

Service Shops

Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and

major overhaul. Machinery breakdowns in the mill may result in a shutdown of the entire mill which, in turn, necessitates a discontinuance of harvesting and transportation operations until mill repairs are completed. Breakdown of harvesting machinery or of cane transportation facilities in turn may result in a shutdown of the entire mill. Repair shops are located in an area extending not more than 300 feet from the mill building. The location of the various service shops is shown on the map attached as Exhibit "F" which is attached hereto and made a part hereof. A list of the shops and the work which is performed by their personnel is as follows:

(a) Machine Shop: This shop is staffed by eight employees working under the supervision of a machine shop foreman. Practically all the machining work of the Plantation, except heavy work required by the mill, railroad and shops, is done in the machine shop. The grinding of crankshafts for cars, trucks, tractors and cranes and the machining of emergency parts for such equipment is also performed here, as well as machine work on irrigation pumps. Major locomotive repairs are made by machine shop personnel working with a heavy [173] crane in the welding shop.

Approximately 46 per cent of all machine shop work is for the mill. Fifty per cent of the annual machine shop work is for other service departments, including repairs to steam engine driven irrigation pumps. During the off season, mill work done by the machine shop accounts for 85 to 90 per cent of the total man-hours' work performed. Work in

this shop is fairly uniform throughout the year with peaks in case of emergency mill repairs and during the mill off season. Locomotive overhaul is carried out to a limited extent during the grinding season to relieve machine shop off season work. Steam engine driven water pumps are scheduled for overhaul after the mill overhaul has been completed and after grinding operations are resumed.

A large portion of the work done by the machine shop personnel is performed within the shop, utilizing shop tools. Shop personnel are, however, from time to time called into the mill, on instructions from the cane processing superintendent, for repairs, regrooving of mill rolls and such other work as cannot be expeditiously handled by mill workers.

The tools of the machine shop include lathes, hydraulic press, drill press, planer, boring machine and crankshaft grinder.

(b) Welding Shop. Five employees work under the welding shop foreman. Approximately 46 per cent of welding shop work is for the mill. During the off season, welding shop work for the mill represents approximately 90 per cent or more of the total man-hours. Most of the welding repairs to mill equipment are made in the shop, although personnel are dispatched to the point of breakdown on instructions received from the cane processing superintendent. Steel cane [174] car repairs are made alongside the shop building by the shop personnel. The welding shop employees also operate pipe rolls located in the pipe rolling shed. The pipe which is rolled is generally irrigation pipe, 18 inches in diam-

eter or larger. Welding of this pipe is performed by the shop welders. In this work the welding shop employees are assisted by employees from the blacksmith or cane loading machine repair shop.

Welding shop equipment consists of heavy pipe rolls, several sets of acetylene and cutting outfits, acetylene generators, two stationary and portable welding generators.

(c) Blacksmith Shop. The blacksmith shop is located adjacent to the mill building. Personnel consists of two blacksmiths and two helpers under the supervision of the Cane Loading Machine Repair Shop foreman. Approximately two days each week are spent by two blacksmiths and two helpers on mill work, consisting principally of constructing and reconditioning of cane carrier leveling and preparation knives. Cane car repair work, such as straightening of bars and channels, repair of tractors and caneloaders and field implement work occupy the great percentage of the man-hours in the shop. Work of this shop is therefore uniform throughout the year.

Equipment of this shop includes two forges, an electric operated hammer and a variety of small tools.

(d) Tinsmith Shop. Personnel consists of a tinsmith journeyman and two employees. In this shop mill repair work is negligible, although light sheet steel work, including maintenance and repair of roof gutters and down pipes, is performed by the shop personnel. Repairs of auto, truck, tractor and caneloader radiators are performed by the shop per-

sonnel. Main work of the shop is the making and reconditioning of tin irrigation scoops. These scoops are used [175] in quantity in the field for the purpose of deflecting water from concrete irrigation flumes to field irrigation lines.

(e) Cane Loading Machine Repair Shop.⁵ Personnel consists of twelve employees under the supervision of a foreman. This shop performs all major repairs and overhaul of caneloaders, grabs and miscellaneous field equipment. Men from this shop are occasionally called upon to assist in the emergency mill repairs. They also go into the field to make repairs on caneloading machines during the course of harvesting operations. An important function of this shop is the construction of auxiliary field equipment, such as subsoilers used in plowing, cane line reshapers used to maintain irrigation water lines in the field, and portable track line leveler attachments used in leveling the lines for laying portable tracks. Repairs on such auxiliary field equipment are also made in this shop with the assistance of tractor repair shop personnel.

During the off season at least six of the seven caneloading machines are completely dismantled and reconditioned. The seventh machine is reconditioned after harvesting operations have been resumed. During the off season following the completion of harvesting, ten to twelve caneloading machine operators are brought into the shop to sup-

⁵ On Exhibit "H" some of the work of this shop is carried under the title "Mechanical Harvesting Department."

plement the regular crew and assist in overhaul. Five cane grabs are overhauled and reconditioned during the off season and all other cane grabs are repaired. Three new cane grabs are usually built during the harvesting season.

Shop equipment includes four portable welding [176] generators and three portable welding generators mounted on trucks for field repairs. A hydraulic press, overhead crane, motor driven grinders and a variety of small tools complete the shop equipment.

Four welders in this shop take care of welding repairs in the field and repairs to and building of new field equipment.

(f) Tractor Repair Shop. Employees in this shop number seven, supplemented during the off season by twelve to fifteen tractor operators brought into the shop from the fields to assist in repairs. All tractors used in the harvesting field are overhauled in this shop during the off season. Tractors used for towing cane line reshapers are also overhauled during the off season. Other tractors which cannot be overhauled during the period of off season are scheduled for overhaul at a later date. This may mean that six or seven of a total of forty-eight tractors are left for operating season overhaul. Tractor engines are overhauled at regular periods.

Shop men may be dispatched for repairs of tractors in the fields. As indicated above under (e) personnel from this shop also assist in the repair of field implements in the caneloading machine repair shop.

(g) Garage. Combined garage and field service personnel numbers 24. The primary work of the garage is the maintenance and repair of 98 plantation vehicles divided as follows: 18 passenger vehicles; 48 pickup trucks up to one ton; 27 heavy trucks from 1½ to 7 tons; one motorcycle; 2 fire trucks and 2 panel trucks. These vehicles are assigned to the various operations as follows: [177]

	Passenger Vehicles	Pickup Trucks	Heavy Trucks	Motor- cycles	Fire Trucks	Panel
Field	5	39	20	---	---	---
Shops	2	3	6	1	---	---
Mill	1	---	---	---	---	---
Hospital	1	---	---	---	---	---
Store	---	---	---	---	---	2
Adminis- tration	7	---	---	---	---	---
Fire Trucks	---	---	---	---	2	---
Motor Pool	2	6	1	---	---	---
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Total	18	48	27	1	2	2
						<hr/>
					Grand Total	98

Overhaul of cars and trucks is scheduled throughout the year with the exception of pickup trucks used by the harvesting men which are overhauled during the off season. Truck drivers are not used to assist in truck or auto repairs since there is generally a spare truck to drive when others are being repaired. Shop equipment consists of 4 overhead cranes, a hoist, valve grinding machine, brake drum lathe, boring machine, tire tools and a variety of special tools.

Complete servicing equipment with necessary personnel is also maintained. Seven full time and one part-time employees are employed to lubricate and wash plantation automobile vehicles at stated inter-

vals. One employee dispenses gasoline and oil at the yard service station. Six employees are employed as helpers to garage mechanics when there is no service work.

Field service covers the daily lubrication of all equipment and replenishing of fuel tanks. Tractors, caneloading machines, portable air compressor, diesel and gas locomotives and all field equipment are serviced daily by a total of 6 men. Two completely equipped service trucks manned by two men each service all field equipment except that in the harvesting fields. In the latter case, a two-wheel [178] trailer, tractor drawn, is kept in each of the two harvesting fields. Oil, gasoline, diesel oil, greases and water are carried on the trailer together with power operated grease guns. One man assigned to each trailer services the cranes and tractors in the harvesting fields. In this way service work can be done during the lunch hour and slack periods without serious interference to harvesting operations. The field men in turn are given an opportunity to learn the operation of loading cranes during their spare time with an opportunity when a vacancy occurs of moving up to a crane operator's job.

(h) Electric Shop. A total of 15 employees works in this shop. Three of these employees are mill electricians who work two weeks in the mill and one week in the shop. This shop is responsible for the maintenance of electric pumps and transmission lines, domestic wiring repairs, including wiring of houses, and the building of new electrical appliances. A small amount of work is done on electrical

machines located in the other shops. In addition to mill repair work done by the employees assigned as electricians to the mill, the electric shop personnel may assist them in case of major electrical repairs required. Approximately 50 per cent of the work in this shop is for the mill. During the off season, approximately 70 per cent of all work is for the mill.

(i) Carpenter Shop. Employees in this shop number 25 carpenters under two supervisors. The carpenters perform all carpenter work on the Plantation which includes the construction of mill scaffoldings, construction and maintenance of railroad trestles and wooden gates for flumes, and the construction and maintenance of cane cars. In addition, they perform necessary maintenance work on plantation buildings and [179] houses. The carpenters also install and maintain steel and concrete pipelines and siphons. Miscellaneous construction, such as construction of tool lockers, scrapers and strainers, is performed in this shop. Field work, including work on the flumes, railroad trestles, siphons, pipelines, etc., accounts for about 25 per cent of the work of the employees. Mill scaffolding and mill building repairs, construction of tool lockers, scrapers and strainers account for about 10 per cent. Maintenance and repairs of plantation buildings and housing account for about 45 per cent. Approximately twenty per cent of the work performed by these employees is devoted to the construction and repair of cane cars. During the off season, the work of the employees in this shop is

similar to that in the grinding season. Additional men, averaging from 10 to 15, may be brought in from the fields to assist in cane car overhauling and general carpentry work during the off season.

(j) Paint Shop. This shop employs five painters under one supervisor. They perform all painting work on the plantation buildings including housing and also occasionally paint siphons and railroad trestles. As a general rule, they do not paint for the mill, this work being done by mill employees. Almost the entire time of the paint shop crew is devoted to painting of plantation buildings and housing throughout the year. During the off season, an average of two additional employees brought in from the fields may assist in the work of this shop.

(k) Plumbing Shop. This shop employs six plumbers working under one supervisor. They perform all plumbing work on the Plantation, including the construction and maintenance of sewer and water systems and the plumbing for buildings and housing. Approximately 10 per cent of the time is devoted to [180] mill plumbing work, 15 per cent to field work and the remainder to housing. Assignments vary little throughout the year. During the off season, an average of two field employees may be assigned to the plumbing shop as helpers.

(l) Roundhouse. Two employees work in this shop servicing, cleaning and firing the plantation locomotives. Additional employees are occasionally assigned to this shop for minor locomotive repairs. It is located near the machine shop.

27.

LABORATORY TESTS AND SAMPLING

Various chemical tests are made by the laboratory personnel in the course of all field and mill operations. This work is performed under the supervision of a chief chemist with the assistance of thirteen chemists, testers and samplers. By careful analyses of various kinds performed relative to the cane and materials in the course of growing, cultivating and harvesting and extraction of the sugar juices, all operations are controlled pursuant to scientific methods.

Determinations of the cane fiber in each field, or variety of cane, are made during each shift. Figures obtained are used in calculating bagasse weights, field distribution and extraction percentages.

Cane leaf analysis is made from samples of cane tops brought in each day and analyzed for green weight mixture, total sugars, nitrogen, potash and phosphate.

Tests are made each day to determine field trash content in harvesting brought to the mill. One car is selected each day for each field being harvested. The car is tagged in the field, placed on side track and then delivered to the mill area. The car is then weighed and the clean sound cane [181] is piled in previously weighed empty cars. Then the car of clean cane and the car from which the dirty cane was removed are weighed and the percentage of trash obtained. Percentage of trash obtained is

used in obtaining the net cane from each field and also the gross cane ground. A check upon cane field yields is maintained in this manner.

Continuous samples are taken from the feed roller of the first mill each hour and also at each change of field harvesting. Records of ratios of cane to available sugar are obtained from these analyses.

Juices extracted by the milling process and entering the boiling house are sampled every hour. Samples obtained are the main basis for determining the sugar in the cane extracted by the milling process and entering the boiling house.

The juice extracted by the discharge roll of the last mill is used in calculating the weight of the bagasse.

One sample is taken every three hours from the clarified juice leaving the clarifier. The difference in purity between this sample and the mixed juice samples will show the relative amount of solids being removed by the lime and heat treatment of the juice.

The purity of the syrup leaving the evaporator is checked with the juice leaving clarifier.

Samples of bagasse are taken every two hours and ash determinations are also made on two samples per day to determine the influence of the different fields on the fire room.

Mixtures of sugar and molasses discharged by the vacuum pans are tested from each full discharge from the pans. Samples are made daily of low grade sugar, commercial raw sugar and waste molasses. The residue removed from the [182] juice dur-

ing the clarification process is made once during each shift. The purpose of this analysis is to determine the amount of sugar lost in the filter cake.

Test is also made of the mill boiler water, locomotive boiler water, steam pumps boiler water and pump water. Pump water from electric pumps and well water are sampled once each month. Wash water from the cleaning plant and condenser water are also analyzed each shift.

28.

Concrete Products Plant

The Plantation operates its own concrete products plant which is located on plantation lands adjacent to the plantation buildings and yard area. At the present time, six men are at work in this plant although the number varies from four to 10 men. Work ordinarily is performed on a single shift basis, but if extra men are working, two shifts may be maintained.

This plant is engaged primarily in producing concrete irrigation flumes and water supply pipe. It also makes some blocks, footings, sidewalk slabs and other various incidental concrete products required by the Plantation. Crushed rock used in the manufacturing process is purchased locally, while 80 to 90 per cent of all cement used is obtained from the mainland. The work consists of setting up forms, mixing and pouring concrete, removing the previous day's products and arranging them in storage. Cement used is stored in cars which are set on the siding near the plant, or the cement is stored in the

cement shed as part of the inventory of general supplies warehousing. In the latter case, unloading of cement is done by the warehouse personnel. [183] Various activities requiring the flumes, pipe and other products receive them direct from the storage area where the products are stored.

The operations do not have any off season. During the off season, however, additional personnel may be brought in from the fields. In 1946, the plant produced approximately 46,000 concrete pieces, including flume sections, pipe and other products.

29.

Storage of Plantation Supplies

Materials and supplies purchased for plantation operations are warehoused or stored in several separate buildings located in the plantation buildings and yard area. Value of supplies on hand averages \$500,000. The total value of goods procured during a year including stock and special order materials averages slightly over \$1,000,000.

Most of the materials received are shipped to the Plantation from Honolulu on the O. R. & L. Purchases may be either local or by order and direct shipment from continental United States. Freight received is placed in the proper warehouses by the warehousing personnel. In almost all cases railroad sidings permit placement of the O. R. & L. cars next to the warehouse receiving the materials. The warehousing personnel is not responsible for, nor does it

engage in, delivering materials to the various operations or shops.

The principal buildings in which the supplies and materials of the Plantation are stored are the general supplies warehouse and the heavy supplies warehouse. They house electrical goods, building hardware, paints, window screening, tractor and caneloading repair parts, copper [184] tubing, pipe stock, metal shapes stock, galvanized sheeting, steel sheets and many other items.

The oil storage warehouse houses lubricants and a limited amount of paint.

Gasoline, fuel oil, diesel oil and kerosene are discharged directly from the O. R. & L. tank cars into storage tanks.

Most of the automotive parts and tractor, caneloading and miscellaneous parts are stored in the garage.

Cement is stored in a separate warehouse. Lime is stored in the mill in the lime room after being unloaded by warehousemen.

Lumber is stored in the open lumber yard adjoining the general supplies warehouse. Herbicides are also stored here.

Fertilizers are usually trucked directly from railroad cars to the field as needed; but if temporary storage is required, they are placed in the sugar warehouse.

The warehousing operations are handled as one unit under a warehouse superintendent with 13 employees. Five clerks perform the bookkeeping and handle accounts. The remainder of the warehouse

personnel is employed in the unloading and storing of stocks and materials, keeping stock record cards and taking inventory.

30.

Main Administration Office

The location of the main administration office is shown on Exhibit "A" and is about fifteen hundred feet from the plantation buildings and yard area. The manager, assistant manager and staff assistants have their offices in this [185] building. The general accounting office, which is located in this building is administered by the office manager. Employees of the accounting office consist of the cashier, bookkeeper, head timekeeper, six assistant timekeepers, eight subsidiary ledger clerks, five stenographers and typists, or a total of 22 employees working under the Office Manager and Assistant Manager. Four of the timekeepers are engaged in keeping time of field employees. The remaining timekeepers keep time of the shop, store, mill, hospital and village maintenance employees. Payroll records are maintained and salaries and services paid. In addition to this, the accounting office accumulates the customary cost data and prepares the usual financial statements.

The civil engineer has his office in this building and has under him one assistant surveyor, two junior surveyors and two rodmen, all of whom work alternately in the field and also maintain offices in the building. One draftsman also works in this office. The agriculturist and also the industrial re-

lations sections are located in the same office building.

31.

Stables

The Plantation has one main stable near the plantation buildings and yard area. It uses 38 horses and mules. Horses are used in the fields by the harvesting overseer to ride in the fields. Pack mules are used upon occasion to pack seed, fertilizer, broken concrete flumes and other things in and out of the cane fields. The Plantation has several feeding stations for horses and mules where they are kept temporarily while work is being performed in a particular [186] area. Three employees are assigned to this work.

32.

OFF SEASON

For efficient operations sugar mills of the Territory must be closed down annually for general repair and reconditioning because of the heavy wear and tear on mill machinery and equipment. That part of the year when the mill is shut down for repairs is termed the "off season." Because of the little variation in climatic and weather conditions from month to month, sugar cane is grown the year around in the Territory and can be harvested and milled any month in the year—and frequently is. The amount of sugar recovered per ton of sugar cane, however, varies somewhat throughout the

year and is highest during the months of May, June and July.

The variation during the year in the ratio of sugar recovery per ton of cane has some influence on the time selected by a plantation for closing down for annual repairs. The selection of the off season is also influenced by wet weather which may make it more difficult to move harvesting machinery in the fields and to burn the leaves from the cane. Exhibit "G" attached hereto and made a part hereof is a date schedule of the off seasons for all plantations in the Territory from 1940 to 1945 inclusive. While it will be seen from this Exhibit that some plantations harvested and milled cane each of the months of the year sometime during this six-year period and that the duration and particular months of the year embraced in the off season differed considerably between the plantations, the majority of the plantations selected their off season sometime during the months of October, November, December and January. Operational [187] difficulties, labor problems, shortages of equipment and other factors frequently make it impossible for a mill to close down during the season when operations are most disadvantageous. For example, the sugar industry of the Territory was on strike from September 1, 1946, to November 19, 1946. As a result of this strike, most plantations of the Territory milled sugar cane during the month of December of that year.

The length of the off season for the sugar indus-

try in the Territory averaged from 2½ to 3 months per year from 1940 to 1945 inclusive as shown by Exhibit "G." But for the Waialua Agricultural Company, Ltd., it averaged approximately three months per year for this period, the dates of which were as follows:

SCHEDULE SHOWING "OFF SEASON"

Year	From	To
1941	Aug. 30, 1941	Jan. 26, 1942
1942	Oct. 6, 1942	Jan. 22, 1943
1943	Oct. 1, 1943	Jan. 17, 1944
1944	Sept. 12, 1944	Jan. 9, 1945
1945	Oct. 3, 1945	Jan. 15, 1946

During the off season for the Territory, there are no harvesting, ratooning, cane transportation, or cane processing operations. All field operations other than harvesting, ratooning and cane transportation continue throughout the year.

33.

Mill Repairs During the Off Season

During the off season extensive repairs are necessary because of severe operating conditions in the mill. In the cane cleaning plant most of the conveyor chains run without lubrication in acid and mud. Stones brought in with the cane damage carrier flights and damage steel plates in carriers.[188] Wet, acid conditions corrode plates and these are replaced when they become thin. Stripping rolls and stripping roll bearings wear out. Chain sprockets wear rapidly because of corrosion and abrasion and are replaced. Bearings are rebushed or bab-bitted and in some cases shafting is replaced. Im-

provements and changes are often necessary. Only during a shutdown period can extensive repairs and alterations be made.

In the crushing plant the mills have to be completely dismantled and worn rolls regrooved or replaced. All turn plates and roll scrapers are replaced. The mill gearing has to be taken apart, inspected and repaired. Worn carrier plates and chains are replaced. Bad piping is fixed and all pumps are overhauled. If these repairs were not done annually, shutdowns would be frequent and excessive losses would be incurred.

In the fire room the tubes in all the boilers are turbed once a year. At this time the drums are scraped and painted and the boilers are inspected by an engineer representing the insurance company with whom the boilers are insured. Extensive repairs to the boiler brick work are usually necessary. Carriers, pumps and valves are overhauled. Piping is inspected and changed where necessary.

Most of the off season repair work is done by the men who operate the mill during the grinding season. All welding is done by men from the welding shop and machine work is done in the plantation machine shop by the machine shop crew except the heavy machine work which is performed in an independently owned and operated shop in Honolulu. The plantation blacksmith shop is called upon frequently and the carpenter shop and electric shop occasionally. [189]

The mill engine tenders do the more important

repair work with the assistance of others. Minor repair jobs are assigned to the oilers. The mill feeders chip the cross grooving in the mill rolls. The cane cleaning plant men work as helpers and scale and paint the steel work in the cane cleaning plant.

In the fire room the oilers, firemen and boiler cleaners turbine the boiler tubes and clean the boiler drums. Brick work is generally done on contract by independent contractors, with the fire room trashmen handling all the materials under the direction of a water tender. Pipe work and carrier repairs are generally done by the water tenders and the boiler cleaners.

Off season work is generally commenced on a three-shift basis. It is necessary that parts going to Honolulu for repairs be sent in as soon as possible. Since the crusher room crane is required in taking the mill apart, it is in great demand to start out with and too much time is lost if all of the men work on one or two shifts. In the fire room it is necessary to get ahead with the tube cleaning and drum cleaning as fast as possible so the boilers may be inspected. As the off season progresses and the work is spread out, it is practical to go on a two-shift and finally a one-shift basis.

The average number of man-days of work performed during each twenty-four hour period during the off season is 116, irrespective of whether the work is on a three-shift, two-shift, or one-shift

basis. This is precisely the same as the average number of man-days of work performed in the mill during each twenty-four hour period during the grinding season, when all work is on a three-shift basis. All mill [190] employees are employed on a forty-eight hour workweek both during the grinding season and the off season.

34.

Mechanization and Improved Management

The reduction of man-days required to produce a ton of raw sugar, including all operations from the field to the mill inclusive, is illustrated by the following table, showing the number of employees working for the Plantation, the total tons of raw sugar produced, the man-days required per ton of raw sugar and the total acres under cultivation, at 5-year intervals from 1910 to 1945 inclusive:

	Number of Employees	Tons of Raw Sugar Produced	Man Days Per Ton of Sugar	Total Acres Under Cultivation
1910	2,726	30,870	21.2	9,889
1915	2,489	30,697	20.8	10,294
1920	1,824	28,284	19.8	10,622
1925	2,444	29,832	20.7	9,244
1930	2,516	49,981	10.4	9,884
1935	1,619	50,580	8.06	8,573
1940	1,237	57,841	6.9	9,565
1945	951	56,193	4.9	9,415
1946 (9/1)	1,144

From the above it can be seen that the number of man-days required to produce a ton of raw sugar in 1910 was 21.2, while in 1945 it was reduced to 4.9 man-days. This reduction in the man-days required to produce a ton of sugar was brought about through mechanization, improved manage-

ment and the application of scientific methods in irrigating, weeding, plowing, planting, harvesting and the processing of sugar cane into raw sugar. To a great extent hand labor and the use of horse-drawn agricultural equipment and vehicles have been eliminated and motorized equipment substituted in their stead. A few examples will serve to illustrate this.

(a) Up to the year 1936 there was little mechanization in the harvesting operation. The cane was all cut and [191] loaded by hand and much of it was hauled from the fields by mule teams which drew the cars over portable rails to main lines of the railroad. In the year 1937 the use of large mobile crawler type cranes with finger-like grabs was introduced to pull or grab the cane loose from its growing position in the field and load it directly into rail cars, eliminating the necessity for practically all hand cutting and loading. In 1945 a mechanical portable rail lifter was introduced for the lifting and laying of portable rails in cane fields, thus eliminating a substantial amount of hand labor. Mechanization in harvesting alone has reduced the number of men required by the Plantation in these operations from 500 in the year 1935 to 132 in the year 1946.

(b) In the year 1910, 240,600 10-hour man-days were used to irrigate approximately the same area which was irrigated in 1945 with 20,069 8-hour

man-days. This saving in manpower was due to gradual improvements in technique and the introduction of a highly scientific flume irrigation system which not only reduced the man-days needed for irrigation but greatly increased the cane yield per acre.

(c) For many years the weeding of the cane fields was done by hand with a hoe, but for the last few years most of this has been eliminated by applying herbicides to weeds by knapsack sprayers, which has resulted in a substantial reduction of the man-hours required in this operation.

(d) In the year 1910 most of the dead leaves on the cane stalks were stripped from the cane and taken out of the fields by hand preparatory to harvesting. This hand labor was finally eliminated in its entirety when it was discovered that the leaves could be removed by burning the cane in the field without injury to the cane or the soil. [192]

(e) A saving of a substantial amount of man-days was also effected in the mill during the last ten years by the introduction of automatic juice scales, semi-automatic sugar bagging equipment, power-driven stirrers for mixing lime in the cane juice, automatic lime control and continuous mud filterers, a continuous clarifier and bigger centrifugals and the fluming of fire room ashes and mud press directly out of the mill into an adjacent field.

35.

Relationship of Cane Production to Cane Processing in Terms of Direct Operating Expenses and Hours Worked

Attached hereto and made a part hereof is Exhibit "H" showing the total direct operating expenses of the Plantation for the calendar year 1945, itemized according to the various categories of operation. This Exhibit is a true and accurate copy of a record of the Plantation which was the basis for a return filed with the Bureau of Internal Revenue by the Waialua Agricultural Company, Ltd., on March 1, 1946, showing direct operating expenses of the Plantation for the twelve (12) months ended December 31, 1945. Included within the direct operating expenses are all charges for direct labor, materials, electric current, engineering, certain equipment and all other direct service charges as classified and listed on such Exhibit.

As shown by this Exhibit, the total direct operating charges for the calendar year 1945 were \$1,726,278.24. Of this amount, \$1,230,393.63 was for cultivating, irrigation water supply, harvesting, transporting of cane and other general field expenses and \$495,884.61 was for operating and repairing the mill and purchasing sugar bags.

Thus, approximately 71 per cent of the direct operating [193] expenses for the production of a single ton of raw sugar in 1945 was for cultivating,

irrigating, harvesting, transportation and general field expenses as tabulated on the Exhibit, while 29 per cent was for mill expenses and repairs during the grinding season and during the off season, and for sugar bags, also as shown on the Exhibit.

This Exhibit also shows the total number of hours of direct labor attributable to the sugar operations of the Plantation for the calendar year 1945, which was 1,332,679.50. Of this number, 1,024,876.25 hours were for cultivating, irrigation water supply, harvesting, transporting and other work relating to field operations while 307,803.25 hours were for operating and repairing the mill.

36.

Plantation Villages

At the time the Waialua Agricultural Company plantation was organized, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane, to accommodate the employees whom the Plantation needed for its operations. As a consequence, it became necessary for the Plantation to construct houses, develop services and otherwise build up and establish facilities for permanent living on the plantation to serve the needs of the required number of plantation employees and their families. The Plantation did this over a period of years and established a perquisite system under which employees of the Plantation received hous-

ing, housing maintenance, water, firewood and kerosene fuel, electricity, medical care, recreational facilities and various maintenance services, including garbage disposal and street cleaning, as a part of their regular compensation. The principal plantation community was established around the plantation buildings and [194] yard area as shown on Exhibit "A" and came to be known as the village of Waialua.

After the plantation was established and continued to operate, there gradually grew up an independent community which is now known as the village of Haleiwa, which is located off the edge of the plantation a little more than a mile from the village of Waialua; and in addition, many non-plantation and independently owned and operated stores, shops, restaurants, service establishments and public schools and churches made their appearance on the plantation itself in and around the village of Waialua to serve the needs of plantation employees and their families living in the area.

By the collective bargaining agreement dated November 19, 1946, between the Plantation and the International Longshoremen's & Warehousemen's Union, Local No. 145-7, which is attached hereto as Exhibit "B," acting for most of the non-supervisory employees of the Plantation, the perquisite system was abolished for all such employees, the value of the perquisites previously allowed to employees being converted into cash wages by the employer and the employee in turn paying cash for

all facilities and services being furnished him by the Plantation. The schedule of rent being paid the Plantation for the occupancy of houses was worked out by collective bargaining with the union and is a part of the bargaining agreement. No employee covered by the existing collective bargaining agreement, including each and every employee defendant herein, is required as a condition of employment to live on the plantation or in Plantation houses or to use any service or facility which the Plantation may be in a position to render its employees. The relationship [195] which exists between the Plantation and its employees who live in plantation houses is that of landlord and tenant. Employees of the Plantation as heretofore are continuing to render services and perform maintenance work on plantation houses and village areas.

At the present time the Plantation owns 820 houses, all of which are located on the plantation. Most of them surround the plantation buildings and yard area and together with the business establishments of the community constitute the village of Waialua. Approximately 335 houses, however, are scattered over the plantation, some of this latter number being clustered and forming field villages. The houses are of frame construction, each house having a yard in front and yard area in the rear which is used for chickens, vegetable gardens or such other purposes as the employees may desire. The lot area for each house may vary from 3,000 square feet to 4,500 square feet or more. The houses face on roads or streets.

On the basis of a census which was completed June 30, 1946, the 820 houses on the plantation were occupied by 3,373 persons, 2,952 of whom were employees and pensioners of the Plantation and their families. The remaining 421 persons living on the plantation and in its houses were lessees and their families who were not employed by the Plantation and who either worked off the plantation or who owned, operated or were employed by independently controlled businesses within it. As of June 30, 1946, there were also 16 employees working on the plantation who lived off the plantation and in houses not supplied or owned by it.

Waialua village has all the physical and visual [196] characteristics of an established community and is similar to a typical small villae or town of a farming community center. The area is criss-crossed with government roads and also roads constructed and maintained by the Plantation. This plantation community offers the usual services and typical commercial establishments to be found in any small town or village. It has ten (10) general stores, two (2) restaurants, two (2) fish markets, one (1) candy store, one (1) hardware store, one (1) clothing store, four (4) barber shops, one (1) beauty shop, one (1) photographic studio, two (2) automotive service stations, two (2) motion picture theatres, one (1) bank and other service establishments, all of which are non-Plantation owned and independently operated; a retail store with two (2) branches, an automotive service station and a hos-

pital owned and operated by the Plantation for both plantation employees and their families and non-plantation persons; and one (1) post office, one (1) public library, five (5) churches, one (1) intermediate and one (1) high school and one (1) day-care center operated as a part of the Territorial School System. There is also existing in this general area of the plantation two (2) gymnasiums, one (1) club house, one (1) swimming pool, two (2) tennis courts, one (1) athletic field and one (1) beach house, all of which were constructed by the Plantation and are available to an Athletic Association, the membership of which is composed of both plantation employees and other persons in the general community, which operates these facilities through dues collections.

The village of Haleiwa is a small business and residential community which is made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to plantation employees and to surrounding [197] community residents, who include persons working at other locations on the Island of Oahu and residents of numerous beach houses and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities.

Attached hereto and made a part hereof is Exhibit "I," a map showing the location of Waialua

village, field villages of the plantation, Haleiwa village and in dependently owned houses, stores, and commercial establishments situated in and about Waialua village, together with the plantation roads and public roads of the area.

37.

Description of Present Activities and Operations

In those instances in this stipulation where certain activities and operations of the Plantation have been described by facts and figures covering a period of time not later than the year 1945, it is to be assumed that such facts and figures represent a substantially true and accurate description of such activities and operations at the present time unless the context otherwise indicates.

Part II

DESCRIPTION OF THE WORK AND
DUTIES OF CERTAIN EMPLOYEES

38.

Each of the persons whose names are hereinafter set forth is now, and for a period of at least one year prior hereto has been, an employee of the Waialua Agricultural [198] Company, Ltd., and as such employee has been performing the work and duties set forth and described immediately following his or her name and in the manner and at the places and times shown; the work and duties of each such person have been and are now being performed in connection with and as a part of the

plantation operations described in full in Part I of this stipulation; and the work and duties of each such person are to be considered as further described by Part I of this stipulation to the extent that Part I is related and applicable to the particular work and duties described for such person in Part II.

39.

CIRACO MANEJA

Ratooning Tractor—Operates a 30 H.P. caterpillar tractor with line shaper attachments to prepare ratoon cane field. He makes minor repairs in the field to the machine which he operates and assists in making major repairs to such machine in the tractor repair shop. During the off season and at other times throughout the year, he cuts firewood for use as fuel by plantation employees living in the plantation villages and hauls stones from plantation fields on stone boat sled in order to clear the fields and assists in tractor repair shop as mechanic's helper in repairing tractors.

All of his work is performed on the plantation. He works under the general supervision of the Field Superintendent.

40.

TAKEO MIYAZAKI

Plowing—In some work weeks he is engaged exclusively in plowing the fields with a 113 H.P. diesel caterpillar [199] tractor preparatory to planting. In other work weeks he is engaged ex-

clusively in driving a tractor of the same type for other field operations. Occasionally he will also do the following work: operate push rake as relief driver, weed cane fields, haul stones off cane fields with stone boat sled in order to clear the fields, cut firewood for use as fuel by plantation employees living in the plantation villages, and assist in tractor repair shop as mechanic's helper in repairing tractors. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

41.

CERILO LENDIO

Planting—Operates a 65 H.P. diesel caterpillar tractor making furrows for planting of cane seed. Makes minor repairs in field on machine which he operates. Assists mechanic in tractor repair shop in making minor repairs on such machine. During the off season and at other times, he assists mechanic in tractor repair shop, cuts firewood for use as fuel by plantation employees living in the plantation villages and operates trench digger machine for pipelines in fields, drainage ditches in fields and ditches for domestic pipelines.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

42.

ANTONE VIERRA

Truck Driver—Hauls field labor almost every day [200] in the early mornings and after work. In some work weeks he is engaged exclusively in hauling fertilizer and other agricultural supplies from plantation warehouses and yard area to plantation fields. In other work weeks he is engaged in general trucking operations for the plantation, such as hauling field labor over the plantation to and from their places of work in the fields, hauling incoming store freight from railroad box cars to the Plantation's retail store and hauling cane tops from fields to plantation stables to feed mules and horses. On rare and infrequent occasions he may also haul mill and other plantation supplies from Honolulu to the plantation. Upon occasion he will also work as a helper in the garage. His work is the same during the off season.

All of his work is performed on the plantation except when he is making trips to and from Honolulu, as indicated before.

He works under the general supervision of the Field Superintendent.

43.

AUGUSTINE LORENZO

Water Supply Ditchman—He transmits, as received from his supervisor, orders for the amount of irrigation water to be delivered to the plantation

from upper reservoir for each work period. He is responsible for arranging diversion gates in the main plantation supply canal so as to distribute the water in proper proportion to the various delivery ditches on the plantation. He checks water measurement status to insure delivery of the proper amount of water into system. He is responsible for the proper maintenance of the irrigation canal system under his charge and for reporting immediately [201] any major breaks or maintenance requirements to the proper plantation authorities. He patrols the ditch lines under his custody to insure proper delivery of water throughout the work day. During the non-irrigation periods, he cleans ditches and tunnels.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

44

Karu Kibota

Steam Pump Operator—Operates steam generating and reciprocating pump equipment to supply water, approximately 97.0% of which is for irrigation of plantation cane fields and approximately 3.0% of which is for domestic use at a plantation field village. Such pump and equipment are a self-contained unit and separate installation located on plantation two (2) miles from the plantation buildings and yard area. See Exhibits "A" and "C". He performs all of his work in the steam generating

pump house. When pump is not being operated, he makes repairs to equipment. He works under the general supervision of the Cane Processing Superintendent.

45

Tadao Watanabe

Rake Operator—He operates bulldozer rake for making fire breaks preparatory to the burning of cane and for opening track lines for the laying of portable tracks. Operates same equipment for fighting emergency cane fires. He bulldozes cane from under telephone and power lines and out-of-way corners which cannot be easily reached by the regular caneloading [202] machine. This cane is bulldozed into piles so that it is available to regular caneloading machine. If he has any minor breakdowns in equipment, he helps mechanic and welder repair them in the field. He also assists on any major repairs to equipment which are made at garage or tractor repair shop. During rainy weather and short shutdown periods, he helps haul cane over portable tracks with same equipment or acts as a common brakeman on the cane cars which are being moved over the portable tracks to the main lines of the railroad.

During the off season he acts as a tractor mechanic's helper in overhauling the tractor which he operates and tractors operated by others. Occasionally during the off season he may work on odd jobs in the mill or cut fire wood for use as fuel by plan-

tation employees living in the plantation villages. All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

46

KOICHI OKOUCHI

Portable Track Plow—Operates portable track plow which is used for the leveling of track lines in the making of beds for portable track.

Occasionally he will help mechanics and welders in repairing tractors. He also carries portable rail for building spurs into cane fields and helps repair such rail.

During the off season he helps tractor repair shop mechanic repair the equipment which he operates. He may also during this period aid in repairing portable tracks in yard adjoining plantation buildings where permanent repair work [203] to portable rails is done. Towards the end of the off season after the above repair work is completed, he may be used in a variety of odd jobs—such as erecting scaffolding in the mill, cutting fire wood for use as fuel by plantation employees living in the plantation villages, weeding and repairing irrigation ditches and unloading of baled empty jute bags used for bagging raw sugar.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

DOMINGO MENOR

Portable Track Lifting Machine—He operates tractor with boom in the laying of portable track and in the reloading of portable track in cane fields of plantation. He works with crew. When weather is too wet to continue operations, he repairs machine and portable track.

During the off season, he assists the principal mechanics in tractor repair shop in repairing machine which he operates. During this period he also helps in permanent repairs of portable track in yard adjacent to plantation buildings and yard area. At the conclusion of such repair work in off season, he performs odd jobs including such as erecting scaffolding in the mill, cutting fire wood for use as fuel by plantation employees living in the plantation villages, weeding and repairing irrigation ditches, unloading of baled empty jute bags used for bagging raw sugar, and on rare occasions loading bagged sugar into box car from warehouse.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent. [204]

TSURUO HAYASHI

Caneloading Machine—He operates caneloading machine in fields of plantation. He makes minor repairs to machine in case of breakdown or aids regular mechanic and welder in doing so. On major

breakdowns he aids in transporting machine from field to caneloading machine repair shop in plantation buildings and yard area in making necessary repairs.

During off season, he aids in overhauling caneloading machine. After this is completed he does odd jobs such as operating shovel machine to clean reservoirs and various irrigation and drainage ditches of the plantation. During the off season, he may also be used in construction jobs or he may help with any mechanical or construction repair work around mill or in tractor repair shop.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

49

CORNELIO ASUNCION

Haul Cane Tractor Operator—He operates haul cane tractor. Hauls empty cane cars into field and full cars out of field. Repairs minor breakdowns on machine or helps mechanic on any major breakdowns. During wet weather when harvesting stops, he may assist in weeding or cultivating or help clear storm ditches or assist in the removal of irrigation flume preparatory to plowing.

In the off season he helps repair cane cars and flat cars—changing parts and doing general carpentry work on wooden portions of rail cars. Such repair work is done [205] in the plantation yard. During such period he may also help in repairing

portable rails. During the latter part of the off season, he performs many odd jobs and in some work weeks is engaged exclusively in cutting fire wood for use as fuel by plantation employees living in the plantation villages, repairing houses and pruning shade trees, etc.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

50

ROQUE CRISOSTOMO

Grader Driver—In some work weeks he is engaged exclusively in driving and operating a motor driven grader for the purpose of leveling and shaping field and village roads of the Plantation and installing water drainage to preserve such roads. In other work weeks he is engaged exclusively in operating grader to build irrigation banks to prevent the run-off of irrigation water, to level off high spots and fill in old ditches in fields preparatory to planting. In others work weeks he may spend a day or two grading around the plantation buildings and yard area or plantation housing areas preparatory to the construction of a new building or house. He may upon occasion in rainy weather work as helper in garage or tractor repair shop repairing trucks or tractors, or help load or unload trucks which carry field, mill or shop supplies.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent. [206]

PETER HOLMBERG

Locomotive Driver—In some work weeks he is engaged exclusively in operating a locomotive with crew hauling loaded rail cane cars from plantation cane field switches to the mill yard and returning empty cane cars to the plantation cane fields. In some work weeks he is engaged exclusively in spotting loaded cane cars in the mill yard for unloading into cane carrier and in removing empty cane cars from the mill yards to nearby spurs.

In other work weeks he is engaged exclusively in hauling rail cars loaded with plantation freight from the O. R. & L. spur to plantation yard and warehouses, and in removing rail cars loaded with sugar and molasses from the sugar and molasses loading stations of the Plantation to O. R. & L. siding; also in such work weeks he picks up empty molasses and sugar cars and spots them on the molasses and sugar loading spurs of the Plantation.

In other work weeks he operates a locomotive for each of the purposes enumerated above.

During the off season he assists in making repairs to plantation locomotives. Part of such repair work is done at the plantation round-house and part is done in space adjacent to the plantation machine shop. See Exhibit "F".

All of his work is performed on the plantation except when and to the extent that he pushes loaded

sugar and molasses cars—from the plantation lines onto the O. R. & L. siding.

He works under the general supervision of the Cane Processing Superintendent. [207]

52

HATSUSUKE SERA

Section Hand on Permanent Tracks—He repairs permanent tracks and maintains plantation railroad rights-of-ways. He installs field switches for connecting main lines of Plantation to field portable track lines. He cleans rights-of-ways. In off season he repairs permanent tracks and cleans rights-of-ways.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

53

TAKUMI OKOUCHI

Flagman at Road Crossing—He flags highway crossings on plantation railroad to protect motorists. During the off season he cleans and weeds the plantation railroad rights-of-way. In wet weather when cane is not being hauled, he may also weed plantation railroad rights-of-way. All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

54

PEDRO DUMLAO

—Cane Carrier—He works at cane carrier one day where he uncouples loaded cane cars preparatory to unloading. Collects cane car tickets showing type of cane and time and field at which harvested. Cleans up around unloading station. The following day he couples up empty cars, cleans empty cars, cleans up around unloading switch. The next day he acts as a watchman on the wash carrier to keep it from being jammed. The following day he removes stones and foreign material from [208] the cane carrier and maintains the cane carrier full of cane. During the off season he helps to clean up around the cane carrier and helps with repairs on cane carrier and cane cleaning plant. He may also during the off season assist in repairs in crushing plant.

All of his work is performed on the Plantation.

He works under the general supervision of the Cane Processing Superintendent.

55

BERNABE HERNANDEZ

Scales and Cane Cleaning Plant—He works in cane cleaning plant for one-half of his working day where he weighs incoming cane cars, notes the gross weight on the cane car ticket and cleans any adhering cane from car which has been dumped. The other half of his work day he operates machinery in the cane cleaning plant. He operates machinery at cane cleaning plant for moving incoming loaded

cane cars into cleaning plant, the cane car dumper, the empty car transfer and the machinery for moving out empty cars. During the off season he helps repair the conveyors at the cane cleaning plant and also helps repair machinery in the crushing plant.

All of his work is performed on the Plantation.

He works under the general supervision of the Cane Processing Superintendent.

56

DOMINGO GUIGUI

Truck Driver—He is engaged exclusively during the grinding season in trucking away from the mill rock and [209] dirt removed from the cane cleaning plant. He deposits such rock and dirt in the fields to fill up holes, gulches and ditches. Such trucking operations are required to be conducted 24 hours a day for the entire harvesting period. During the off season he is engaged in general trucking operations for the Plantation.

All of his work is performed on the plantation except that from time to time he may haul plantation supplies from Honolulu to the Plantation. Some of these supplies are shipped to Honolulu from the continental United States.

He works under the general supervision of the Field Superintendent.

57

USHINOSUKE KONDO

Crushing Plant—He works in crushing plant maintaining flow of cane through the crushing

mills by regulating the speed of the driving engines. He also regulates the intake or flow of water used to wash out the last removable sugar in the cane fiber. This water is added to the cane blanket before it passes through the last crushing mill. In the off season he repairs crushing plant equipment.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

58

TERUICHI KUBO

Boiling House—He boils low grade massecuites (returned molasses and small sugar crystal seed from high grade process) until crystallization has taken place and proper grain size obtained. He also checks on the boiling of the high grade massecuites or mother liquor. On week-ends [210] he makes minor repairs and cleans pan tubes if necessary. During the off season he makes repairs to boiling house equipment.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

59

MASAIKI OATO

Evaporators—He boils sugar juices in series of evaporators to proper concentration. He also tends lime mixing station and clarification station. He makes minor repairs and cleans evaporators over

the week-ends and during off season he repairs boiling house equipment.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

60

SIMON CUMLAT

High Grade Centrifugals—He purges high grade massecuites in centrifugals and discharges the purged sugar. On the week-ends he cleans evaporator tubes. In the off season he helps clean and repair boiling house equipment.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

61

APOLONIO LAZO

Low Grade Centrifugals—He purges low grade massecuites in centrifugals and discharges purged low grade [211] sugar from centrifugal baskets. On week-ends he cleans evaporator tubes. During the off season he helps clean and repair boiling house equipment.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

62

GIICHI HAMAMOTO

Sugar Bagging and Loading of Sugar—He operates a sugar bagging machine on sugar flowing from

centrifugals. (Sugar passes from high grade centrifugals into dryer and thence to temporary storage bin and thereafter through automatic scales to bagging machine.) The other half of his day he stacks bagged sugar in rail cars, as it is delivered from mechanical carrier, for shipments to port. In emergencies when shipping facilities are unavailable, he may assist in stacking bagged sugar in sugar warehouse for temporary storage and later removing same to rail cars. In off season he paints interior of mill buildings and the boiling house equipment; he helps on repairs to boiling house equipment; and he installs rigging for lifting boiling house equipment and lifts with chain tackles or mechanical devices.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

63

DIONICIO CARRIT

Fire Room—He works in fire room regulating flow of bagasse to furnaces, regulating furnace draft, all to [212] maintain proper steam pressure in fire room for the operation of mill machinery, power plant machinery and boiling house equipment. At times of mill stoppages he feeds back by hand excess bagasse to the furnaces. During the off season he cleans boilers, drums and tubes and helps to lay furnace bricks for reconditioning of fire room.

All of his work is performed on the plantation.

He works under general supervision of Cane Processing Superintendent.

64

SERAPHINE ROBELLO

Power Plant—He operates power plant electric generating and switching equipment and air compressors. He also makes minor repairs to this equipment. During the off season he makes repairs to power plant generating equipment. (Generating equipment completely closed during the off season and all power purchased from Hawaiian Electric.)

All of his work is performed on the plantation in connection with the generation of electric power for the overall operations of the Plantation as heretofore described in the stipulation of the general facts.

He works under the general supervision of the Cane Processing Superintendent.

65

TOSHIO TANAKA

Machine Shop—During the grinding season he machines parts for both mill and field equipment during same work weeks. During off season his work is largely confined to machine operations on mill equipment, but also from time to [213] time during such period it is necessary that he perform machine work on field equipment. When a metal part in cane processing machinery breaks during grinding season and cannot be welded, he is called in to take measurements for purposes of repairing or making new part as quickly as possible as the

mill is generally required to close down until the repairs are completed, which, if continued for any appreciable time, may result in a considerable financial loss as is hereinbefore described in the stipulation of the general facts. He may also upon occasion assist in installation or reassembly of part in machinery. Upon occasion he will go to canelodging machine repair shop or tractor repair shop or garage to take measurements for repairing or reproducing broken parts. He also machines axles for cane cars during the entire year and machines parts for the locomotives, steam pumps and electric pumps.

All of his machine works, however, is done in machine shop of the Plantation which is located adjacent to the mill.

He works under the general supervision of the Cane Processing Superintendent.

66

BARNEY FARIA

Locomotive Repair—He makes minor and major repairs on all plantation locomotives. Minor repairs are made at the round house located in the plantation buildings and yard area (see Exhibit “F”), and occasionally some places on the main line of the plantation railroad. Major repairs for the most part are made in the welding shop. His work is the same during the off season. During the off season he is assisted [214] by several of the locomotive drivers.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

67

FUMIO SUNAHARA

Welding Shop—He is engaged in welding operations, making repairs on mill machinery, irrigation pipe lines, cane cars, locomotives, steam pump equipment and electric driven pumping equipment. The water pumped by such equipment is used for cane field irrigation, by the mill for cane processing, for condensing exhaust steam from power generating units, for domestic use and to supply water to gardens of plantation employees and to a few small farms all of whose produce is consumed locally. When mill equipment requires welding repair during processing operations, he is called to make such repairs as quickly as possible as the mill is generally required to close down until the repairs are completed, which, if continued for any appreciable time, may result in a considerable financial loss as is hereinbefore described in the stipulation of the general facts. In performing his work, he welds either in the welding shop located adjacent to the mill, or in the mill during grinding operations or at outside points where equipment is being repaired. Occasionally he assists in the repair of field equipment, tractors, trucks and harvesting machinery. Such repair work may be done in the field. Welding of fabricated steel pipes for irrigation system is done in the welding shop and assembly welding of the pipes is done in the field. He per-

forms the same work during the off season except that [215] the majority of work is performed in the mill.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

68

HIROSAKU TAKATA

Blacksmith Shop—He works as a smith. He repairs field implements and makes parts for field equipment. Does small amount of horseshoeing. Two days of each work week during grinding operations he makes repairs for the mill. He also makes repairs to cane cars and frames of trucks used throughout plantation operations. During the off season his work is the same.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

69

KIICHI YAMADA

Tinsmith Shop—In most work weeks he is exclusively engaged in making irrigation gates from thin-gauge galvanized metal, in making repairs to auto and truck radiators, which autos and trucks are used throughout the plantation operations, in making small cans for spraying of herbicides in fields and along roads and irrigation ditches and in maintaining them in repair and in repairing knapsack sprayers used in field spraying. In some work

weeks, however, in addition to the above, he makes repairs to mill equipment and on rare and infrequent occasions makes up and installs gutters on mill and shop buildings. Irrigation gates are made and radiators repaired in tin shop located in plantation buildings and yard [216] area as shown on Exhibit "F"; other work is performed outside at place of construction or repair, but all of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

70

ALFRED REYHER

Caneloading Machine Repair Shop—In most work weeks he is engaged exclusively in making repairs to field caneloaders and to field equipment, grabbers, subsoilers and ratooning equipment. In some work weeks, however, and on emergency occasions during the grinding season when there is insufficient manpower available from the machine and welding shops, he spends part of his time assisting in making repairs in the mill. He does more major overhauling on cranes during the off season. The major portion of his work is done in the field during the grinding season and almost exclusively in the shop during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

71

MASARU EZAWA

Tractor Repair Shop—In most work weeks he is engaged enclusively in making repairs to tractor and field implements. Major overhauls are carried out within the tractor repair shop, but repairs which do not require complete dismantling of equipment and which can be conveniently made there are done in the field. In some work weeks, however, and on emergency occasions during the grinding season when [217] there is insufficient manpower available from the machine and welding shops, he works in the mill to assist in making repairs. During the off season he spends all of his time overhauling tractors and field implements which are brought in from the field and completely overhauled.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

72

DAMASO CLAUNAN

Garage—He works exclusively in repairing and maintaining automobiles and trucks used throughout the plantation operations. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

73

ANTONE ROBELLO

Servicing—Delivers gasoline, fuel oil, lubricants and water to plantation field equipment and assists in servicing such equipment. He works out of plantation garage. His work is same during the off season.

In going to and from fields he travels over plantation field roads and public highways which run through some plantation areas.

He works under the general supervision of the Cane Processing Superintendent. [218]

74

MANUEL DAMAS

Service Station—He dispenses gasoline, diesel oil and lubricants for all plantation cars and trucks and fuel oil for plantation bath houses at plantation service station. He also dispenses fuel oil and gasoline to service trucks which in turn supply plantation tractors and caneloaders. He handles no grease jobs or other such work. His work is same during the off season.

All of his work is performed at the service station which is located in the plantation buildings and yard area.

He works under the general supervision of the Warehouse Superintendent.

KEICHI KAMIYAMA

Electrician—He is engaged in electrical service and repair work. The building in which or from which he works is known as the electric shop and is situated in the plantation buildings and yard area as shown on Exhibit “F”.

In some work weeks he is engaged exclusively in repairing and servicing electrical equipment situated and used in the plantation sugar mill in connection with the processing of cane into sugar. In other work weeks he is engaged exclusively in repairing and servicing power lines which carry power from the plantation's power house and substation to its electrical irrigation pumps, and also in repairing and servicing such pumps. In some work weeks he is engaged exclusively in repairing and servicing electrical motors used to repair tractors in the tractor repair shop. [219] In still other work weeks he is engaged exclusively in repairing and servicing power transmission lines of the Plantation which furnish light and power to plantation buildings, motors and dwellings and some non-plantation buildings and dwellings. He also installs household electrical equipment. In still other work weeks he does each of the things which are enumerated above in the same work week.

His duties during both the grinding and off seasons are the same.

All of his work is performed on the plantation.

He works under the general supervision of the Cane Processing Superintendent.

76

YOSHIJI YAMADA

Carpenter Shop—Works as carpenter in repairing plantation railroad bridges, flumes, constructing and repairing plantation houses, repairing all plantation buildings and performing miscellaneous carpenter shop jobs and mill carpentry. Also does construction and repair work on steel and concrete pipelines and siphons used in connection with irrigation and water supply systems. He may go into mill at any time to construct scaffolding necessary to do emergency repair work. His work is the same in the off season.

All of his work is performed on the plantation.

He is under the general supervision of the Construction Superintendent.

77

EDWIN MORI

Carpenter Shop—Engaged in performing carpentry and related repair work on railroad cars. Upon occasion he may [220] assist in keeping office records in connection with the repair and maintenance of such railroad cars. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Construction Superintendent.

GENJIRO HIRONAKA

Carpenter Shop—Works exclusively in the carpenter shop. Most of his work is performed in connection with the care and maintenance of shop tools, machinery and equipment. He also repairs plantation equipment, makes scrapers used for cleaning of centrifugals, conveyor slats used in mill conveyors, and push poles for unloading cane cars, and repairs wood on all station wagons and trucks. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Construction Superintendent.

JIRO SAKAI

Paint Shop—Works as a painter exclusively. In most work weeks he is engaged exclusively in painting plantation houses. In some work weeks, however, he works exclusively in connection with the painting of office buildings, plantation gymnasium and club house and other plantation buildings exclusive of the mill. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Construction Superintendent. [221]

MARGARET FUJIWARA

Laboratory—She makes daily analyses of sugar juice and syrups; determines hydrogen ion, density, and salt concentrates of mill boiler water, steam pump boiler water and locomotive boiler water for purposes of maintaining proper mill, pump and boiler water purities while cane is being processed or steam pumps operated. She also types reports and does laboratory office clerical work. Assists in making nitrogen and moisture analysis of cane leaf blades and analysis of total sugars in cane leaf sheaths. During the off season she does clerical work for the general supplies warehouse which handles storage of much of the plantation supplies and materials, including supplies and materials for mill, shops, field, plantation houses and administrative offices. She also recharges fire extinguishers as required during the grinding season.

All of her work is performed in the laboratory or general supplies warehouse, (except to obtain boiler water samples in fire room each day), both of which are located in plantation buildings and yard area as shown on Exhibit "F".

She works under the general supervision of the Cane Processing Superintendent except during the off season when she is under the Warehouse Superintendent.

81

LOUIS PACHECO

Cane Leaf Sampling—He collects daily samples of cane leaves from various fields on the plantation and prepares them for foliar chemical analysis in the plantation laboratory for the purpose of determining the plant food requirements [222] and plant food status of each field of sugar cane on the plantation. After preparing the samples for analysis by an assigned technician, he returns to the main administrative office where he is engaged in clerical work pertaining to the assembly of laboratory information and its correlation with other growth factors and data which will permit the maintenance of a graphic log of all factors of weather, irrigation and fertilization which might affect the growth and production of sugar cane. He does some of the simple laboratory work. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

82.

YUKISHIGE TSUTSUI

Concrete Products—Works in concrete products plant located on plantation near plantation buildings and yard area, where he assembles forms, pours concrete, drives a finger-lift in connection with the making of concrete flumes, pipes, house foundation blocks, flume footings, sidewalk blocks

and other concrete products which are used by Plantation in its fields or villages. His work is the same in the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Construction Superintendent.

83.

YACK CHUN LEE

General Supplies Warehouse and Heavy Supplies Warehouse—He is employed in general supplies warehouse situated [223] about 100 feet from the mill. He checks and keeps records on incoming materials and supplies. He keeps records on warehouse inventory. Occasionally checks out merchandise to mill, field and shops. Prepares some order lists for new materials and supplies. Upon occasion will also unpack supplies and place same in storage in warehouse which is in a building adjoining the general supplies warehouse. His work is the same the year around.

All of his work is performed on the plantation.

He works under the general supervision of the Warehouse Superintendent.

84.

EIKO SAKAGUCHI

Clerical Help—She keeps all records for all construction work performed on cane cars, houses, mill and other plantation buildings and keeps the time of all men in the Construction Department, keeps

the records of all products made at the concrete products plant, keeps inventory of concrete products on hand, and makes out monthly reports for the Department. She records all work orders and keeps records of all interdepartmental jobs. Does general office work. All her work is done in headquarters office of the Construction Department situated in carpenter shop located in the plantation buildings and yard area. Her duties are the same during the off season.

All her work is performed on the plantation.

She works under the general supervision of the Construction Superintendent. [224]

85.

MOSES FERNANDEZ

Village Cleaner—In most work weeks he is engaged exclusively in sweeping up leaves, rubbish and trash in plantation villages. In other work weeks, in addition to the above, he may work in the fields keeping main ditches free from weeds. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Field Superintendent.

86.

TOSHIO KASHIWABARA

Sewer and Water—Constructs and repairs all plumbing installations of the plantation—including plumbing for domestic sewer and domestic water

supply systems, houses, mill, and other plantation buildings having toilets and wash room facilities. In many work weeks he is engaged exclusively in constructing and repairing plumbing for plantation houses and for the water and sewerage systems servicing such houses. His work is the same during the off season.

All of his work is performed on the plantation.

He works under the general supervision of the Construction Superintendent.

Part III

SCOPE OF CONTROVERSY AND DISPUTE

It Is Hereby Further Stipulated by and between the parties hereto as follows: [225]

The controversy involved in the suit pursuant to which this stipulation is made and filed raises the question of whether the employees of the Plantation named as parties defendant herein and all other employees of the Plantation who are similarly situated are entitled to overtime compensation pursuant to the provisions of Section 7(a) of the Fair Labor Standards Act of 1938.

No controversy exists with respect to the application of the minimum wage provisions of the Fair Labor Standards Act of 1938 to the defendant employees herein or any other employees of the Plantation similarly situated as the lowest paid employee of the Plantation is paid at an hourly rate in excess of that required by the Fair Labor Standards Act of 1938.

The parties are agreed that any employee named herein as defendant who is held not to be subject to the Fair Labor Standards Act of 1938 or who is held to be exempt therefrom, and any other employee of the Plantation similarly situated, is subject to the maximum hour provisions of the Hawaii Wage and Hour Law and must be paid at a rate of not less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he is employed for all hours in excess of forty-eight (48) hours per week.

/s/ RICHARD GLADSTEIN,
Attorney for Defendants.

/s/ RUFUS G. POOLE,
Attorney for Plaintiff,

/s/ E. C. MOORE,
Attorney for Plaintiff. [226]

[Exhibits A, B, C, D, E, F, G, H, and I referred to in the Stipulation are identical with similarly lettered exhibits attached to the Complaint, which exhibits are reproduced hereinbefore as part of the Complaint but are not reproduced as part of said Stipulation.]

[Endorsed]: Filed Sept. 12, 1947.

No. 11952

United States
Circuit Court of Appeals

for the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY,
LIMITED, a corporation,

Appellant,

vs.

CIRACO MANEJA, et al.,

Appellees.

and

CIRACO MANEJA, et al.,

Appellants,

vs.

WAIALUA AGRICULTURAL COMPANY,
LIMITED, a corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 257 to 459

AUG 18 1948

AUL P. O'BRIEN,

CLERK

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Upon Appeal from the District Court of the United States
for the Territory of Hawaii

In the United States District Court for the
Territory of Hawaii

Civil No. 787

WAIALUA AGRICULTURAL COMPANY,
LTD.,

Plaintiff,

vs.

CIRACO MANEJA, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on September 18,
1947, at 9:00 o'clock, a.m.,

Before: Hon. Delbert E. Metzger, Judge.

Appearances: Rufus G. Poole, Esq., appearing
for the Plaintiff; E. C. Moore, Esq., appearing for
the Plaintiff; Richard Gladstein, Esq., appearing
for the Defendants.

Honolulu, T. H. [227]

PROCEEDINGS

One more point I want to mention to your Honor
and I [276] shall conclude my opening. It may
strike your Honor as possibly curious that the
Wages and Hours Division has not intervened in
this action. As your Honor knows, the law we are
concerned with here creates the office of an admin-
istrator whose duty it is to enforce the law, who

obviously has an interest, a decided interest in any litigation where some important question, where so important question as this is going to be decided I want to say for my part, I think that I have done everything necessary or possible to inform the administrator of this litigation and to make the way possible for him to intervene if he so saw fit.

I provided the regional office in San Francisco some months ago with a copy of the complaint and copies of the exhibits and advised that office of the pendency of the litigation and of the fact that we would be here on trial some time this fall. I have not heard from them since, and apparently there is nothing in the records of this Court to indicate that they have any interest in the matter. But I merely make that statement to you so that your Honor will know that we at least have not been amiss, remiss in this connection. In effect, we have invited them to come in and state their position, with which we may or may not agree in whole or in part, but we felt that they certainly had a right and perhaps a duty to express themselves on this.

Now, the Court may feel that it wants to hear from [277] the Administrator's office. I don't urge it one way or another. But I merely raise that question. The Court may feel that the Administrator ought to be heard from as a sort of third, neutral, impartial party here to inform the Court, if the Court so desires. We don't have any objection to it.

I will call as my first witness, your Honor, Mr. Hall.

JACK W. HALL

a witness in behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Gladstein:

Q. Will you state your name please?

A. Jack W. Hall.

Q. What is your address, Mr. Hall?

A. 2955 Oahu Avenue, Honolulu.

Q. How long have you lived in the Territory?

A. Since 1935.

Q. What is your occupation?

A. I am regional director for the International Longshoremen's and Warehousemen's Union.

Q. With offices where?

A. Pier 11, Honolulu.

Q. How long have you occupied that position?

A. Since June, 1944. [278]

Q. Have your activities or has your occupation in the Territory since you arrived here always been connected with the I.L.W.U.?

A. No, it hasn't.

Q. Will you state what your activity or occupation has been?

A. When I first arrived here I worked in organizing for independent unions that were then organizing in the Territory, particularly among the longshore groups that later became part of the I.L.W.U.; later for the United Cannery, Agricultural and Packing and Allied Workers of America,

(Testimony of Jack W. Hall.)

a C.I.O. affiliate that took into membership workers in packing, canning and agricultural enterprises.

Q. Tell us something about your experience in the sugar industry or in connection with it, Mr. Hall, starting with your first contact with that industry?

A. My first direct contact with the sugar industry was in April of 1937 when I assisted a Filipino labor organization known as the Vibora Lubiminda, a Filipino organization trying to organize Filipino workers on the Island of Maui. That organizational campaign culminated in a strike that did have some success.

Q. In connection with that work and those activities that you just referred to, Mr. Hall, what contact, if any, did those activities bring you into with respect to the [279] operations of any sugar plantation?

A. I was in direct contact with the workers on Maui Agricultural Company, the Hawaiian Commercial and Sugar Company, and the Pioneer Mill Company, and the Wailuku Sugar Company, all on the Island of Maui. At that time I had no opportunity to observe mill operations because the Companies involved were rigidly excluding any outsiders as trespassers.

Q. What opportunity, if any, did you have, that were afforded you and which you took advantage of, to acquaint yourself with the work of the employees in the sugar industry?

A. We had many conferences with the workers involved to ascertain the methods of work and

(Testimony of Jack W. Hall.)

methods of compensation for the purpose of formulating demands.

Q. What was your next activity or contact with the sugar industry or any phase of it?

A. Well, that came later in '37 and in 1938 on the Island of Kauai, where following the organization of stevedores of Port Allen and Ahukini organization was spread into the plantations in that area. I lived on the Island of Kauai for almost two years and had very intimate connection both with the field and factory operations. The organizing campaign there culminated in the organization of the McBryde Sugar Company. A contract, the first one in the sugar [280] industry, was reached in 1941. Also had organization in several of the other sugar companies on that island.

Q. What experience did you have, what observations did you make in respect of the various operations or activities in the sugar industry during that two-year period?

A. During that two-year period I had gone through the McBryde mill and through the mill of the Hawaiian Sugar Company, which is now the Olokele Sugar Company, and had opportunity for observing the practices, at least in the mill yards of the other companies.

Q. Did you not have occasion to discuss with employees grievances or other matters which involved a complete discussion of the types of duties and functions of employees in various portions or aspects of the sugar industry?

(Testimony of Jack W. Hall.)

A. Yes, of course. I made it my business as a part of my job to familiarize myself with all of the processing activities——

Q. Would you say——

A. ——manufacturing activities.

Q. Go ahead. Would you say you become fully acquainted with the operations of the sugar industry including all its aspects?

A. Including all of the aspects from the cultivation and harvesting through the manufacturing and shipping processes, yes. [281]

Q. Now, after that period which you described on the Island of Kauai, what was your next contact with or experience in the sugar industry?

A. Well, during that period on Kauai I did represent the union in a number of public hearings, both before the Agricultural Adjustment Administration, before the Territorial Unemployment Compensation Bureau, in contact with the Social Security Board, involving the application of the Social Security Act, the Unemployment Compensation Law, the Sugar Act of '37, with those agencies. Also at that period we made a study of the application of the Wage and Hour Law. That was the Fair Labor Standards Act of 1938 to the sugar industry. And we came to the conclusion that the industry was violating that law in many respects. And we asked—I believe it was in 1940—that the Wage and Hour Division hold a hearing in the Territory to determine first the reasonable cost of perquisites because the valuation placed upon perquisites came into play

(Testimony of Jack W. Hall.)

both on the minimum wage provisions of the law and the overtime provisions.

The plantations were computing the reasonable cost of perquisites at six cents per hour. Some of the employees at that time were receiving a cash wage of 19 cents per hour plus this reasonable cost of six cents which the plantation contended met the minimum wage at that time of 25 cents per hour. That was 1939, not 1940. [282]

It was our belief that the cost of six cents per hour was not correct for many of the employees.

Mr. Poole: Your Honor, I don't object to the questions, to this testimony that is being given, but I do object to the speech that is now being made in the record. It is not responsive to the question. It has nothing to do with Mr. Hall's qualifications. I should like to hear how he is qualified to testify on the matters that are before us.

The Court: Sustained.

By Mr. Gladstein:

Q. Now, Mr. Hall, in connection with these projects that you have mentioned, that is, your appearances with respect to the three, a wage-hour law, social security, unemployment compensation, etc., were you required or did you make both personal, factual investigations and studies dealing with the subject?

A. I did. I was the spokesman for the union in all of those activities.

Q. And state in general, without too much detail, what studies you made and what investiga-

(Testimony of Jack W. Hall.)

tions of fact in the industry you made and what you did to familiarize yourself entirely and thoroughly with the problems and the facts to enable you to present these matters on behalf of the employees during those periods?

A. First a personal observation of the methods used; [283] second, discussion with the employees involved as to their specific duties; third, trying to apply those facts and observations to the law and to administrative opinion.

Q. Did you prepare written briefs and make oral presentations?

A. Not specifically on the Wage and Hour Law but on the other matters, yes.

Q. Did you have occasion to talk with representatives of Government on these matters that you were working on? A. Yes, I did.

Q. Did you meet any of them?

A. Mr. Howard Durham, who was agent for the Department of Labor in the Territory and who was acting for the Administrator of the Wage and Hour Law; Mr. Holcomb, who was then in charge of the local office of the Social Security Board; Captain L. Q. McComas, who was then in charge of the Bureau of Unemployment Compensation. There may have been many others.

Q. Did you ever have occasion to talk with Mr. Poole on any problem in this industry?

A. Yes, following the request for a hearing on the value of perquisites that I mentioned earlier,

(Testimony of Jack W. Hall.)

Mr. Poole came to the Territory as a representative of the Department of Labor and I discussed at that time a request for a hearing.

Q. You discussed the facts and claims and contentions [284] of the people you were representing made?

A. Not too much in detail at that time.

Q. Now, the Mr. Poole you have reference to is the Mr. Rufus Poole the attorney for the Plaintiff in this case, is that right?

A. That's right.

Q. Mr. Hall, did you ever have occasion to represent the union in any proceedings before the National Labor Relations Board dealing with this industry, sugar industry?

A. Yes, in August, in July and August of 1944 when I was the regional director for the I.L.W.U. I represented the union in proceedings before the National Labor Relations Board which were held in Hilo to determine which workers in the industry were engaged as agricultural laborers within the meaning of the National Labor Relations Act.

Q. And did you prepare and present that case as the union representative?

A. I did.

Q. Participated throughout that hearing?

A. I did.

Q. Now, have you had occasion to participate in collective bargaining negotiations with the Plain-

(Testimony of Jack W. Hall.)

tiff Company or any association representing it dealing with employees in the sugar industry?

A. Yes, I have, in 1945 and again in 1946 and this [285] year.

Q. And in addition to such collective bargaining negotiations have you had occasion to take up grievances or other matters during the contract year with representatives of industry in respect to one or another of the phases of operation or activity in this instance? A. Many times.

Q. You said that had happened numerous times, is that correct? A. That is correct.

Q. Did you have occasion, have you had occasion to participate in conferences with union members who are workers in one or another of the sugar plantations where problems have been discussed with respect to the operations and activities of the Company? A. Many times.

Q. Now, with respect of the settlement of the wage-hour suit last year, did you not have occasion to participate in conferences both with representatives of industry and conferences with me as counsel for the employees dealing with this suit and the questions involved in this suit?

A. I was constantly involved in those suits from the moment they were in the process of preparation until the final declaratory judgment.

Q. And you spent many hours in a discussion of the [286] facts, problems and legal issues with me on those cases, is that right?

A. That's correct.

(Testimony of Jack W. Hall.)

Q. And also with Mr. Winn, Montgomery Winn, who was representing the H.S.P.A., is that right?

A. That's right.

Q. And also in conference where other representatives of management were present, isn't that true?

A. That's true.

Q. Have you ever been employed by any government agency?

A. Yes, I worked for the Territorial Department of Labor from April 1942 until June of 1944.

Q. In what capacity?

A. First as an inspector in the Wage and Hour Division; later as senior inspector in that division.

Q. And in that connection what, if any, contact did you have with the Wage and Hour Division under the Federal Act?

A. We had frequent consultation with the individuals in charge of the Department of Labor here, who also administered the wage-hour law, first Mr. Durham, Howard E. Durham, and later Mr. Ernest E. Norbeck.

Q. Now, did that work and those conferences, contacts that occurred in connection with the performance of your [287] duties for Wage-Hour in the Territory bring you into contact with various facets of the sugar industry?

A. That is correct. We had discussion on what we believed at that time was coverage under the Territorial Act and what we believed was coverage under the Federal Act insofar as the sugar industry was concerned.

(Testimony of Jack W. Hall.)

Q. Have you personally been through the operations at the Plaintiff's plant at Waialua?

A. I can't recall that I have been through, specifically through all of that mill. I have been in parts of it. But the process is the same generally in all mills.

Q. How many mills would you say you have been in or through and observed operations?

A. I would say over half in the Territory.

Q. How about the field activities?

A. I have been on every plantation in the Territory, I think, except Gay and Robinson and the Waimea Sugar Mill Company, which are two small unorganized companies without mills on the Island of Kauai.

Q. Have you done any reading to supplement your own personal experiences, reading of official or expert printed material dealing with the sugar industry or various aspects of it in this Territory?

A. As much as I could obtain.

Q. Can you recall any of the specific documents or [288] bulletins or books that you have read and absorbed from?

A. Well, I am familiar with the Department of Labor surveys over the years. I have read some of the sugar industry's own literature, including their sugar manual. I have read some material on sugar industry in other areas.

Q. Have you read this document that I referred to this morning, Bulletin 687, entitled "Labor in the Territory of Hawaii?"

A. I have.

(Testimony of Jack W. Hall.)

Q. And particularly the portions that had to deal with the sugar industry, is that right?

A. That's correct.

Q. Now, Mr. Hall, at my request you took a copy of the complaint in this case, did you not, and went through the job description of each of the types of employees whose activities are described in the complaint, isn't that right?

A. I did.

Q. And did you make some notes on the copy that I handed you for that purpose?

A. I did.

Q. Would it assist you in the testimony that I am about to ask you to give with respect to those employees—if you had the copy that you were working on?

A. Very much so. Those descriptions are somewhat in detail. [289]

Mr. Poole: No objection.

(Mr. Gladstein hands a document to the witness.)

Q. Now, I will ask you to turn to page 31 of the complaint in this case. On that page you will observe that there commences the description of the first of the groups of job types or job classification descriptions. Paragraph 38, referring to Ciraco Maneja, who was entitled "Ratooning Tractor Operator," would you go through the description of the duties of that job and indicate what connection, if any, those duties or any part of them have with agricultural work or farming?

A. The first statement as to his duties says that he operates a tractor for the purpose of preparing

(Testimony of Jack W. Hall.)

a ratoon cane field. That is purely an agricultural operation. Next, he makes minor repairs—

Mr. Poole: Your Honor, I want to object to the character of this testimony. I want to be heard on it fully, and I think that now is the time I should like the Court to hear me.

The Court: I'd say that this is the time to be heard on your objection. [290]

Mr. Poole at this point objected to the testimony sought to be adduced from Mr. Hall as to what activities constitute "agriculture" within the definition of that term contained in the Fair Labor Standards Act. The basis of the objection was that such testimony is incompetent because the Act contains a specific definition of the term "agriculture" and therefore whether particular activities constitute "agriculture" depends upon whether they come within the term as defined in the statute and not upon any witness's views as to what are "agriculture" within such definition.

Defendants' attorney, Mr. Gladstein, argued that the testimony of Mr. Hall was not being offered for the purpose of showing what activities of the defendants are "agriculture" but rather for the purpose of setting forth the claims or position of the defendant.

The Court ruled that the testimony of Mr. Hall should be confined to a description of the details of the various operations performed by the defendants. By Mr. Gladstein:

Q. Now, Mr. Hall, turning to the duties set forth

(Testimony of Jack W. Hall.)

in paragraph 38 of the employee Ciraco Maneja, will you refer to the particular duties set forth there in respect of which it is our claim that they are not exempt, and discuss those duties?

A. First of all, for the purpose of clarifying this description, it should be noted that the stipulation provides that during certain times throughout the year this employee works in the tractor shop as a mechanic's helper in repairing tractors. The term "tractor" by itself is somewhat misleading because tractors are used both for the purpose of preparing the soil but they are also used for the purpose of making roads; they are also used for the purpose of preparing a way for laying down portable track; they are also used for the purpose of hauling cane cars out of fields, which would be a part of the transportation operation under our position in this proceeding. And in work weeks when this individual would be working on tractors used for that purpose, he would not be engaged in doing [310] any work in connection with the soil as such.

Q. What about the cutting of firewood, tell us about that? What does it consist of? Where does it go?

A. Well, the firewood is used to supply community bath houses, and the individual employees in the housing areas, housing areas of course that don't have anything to do with the preparation of the soil or with the harvesting of crops.

Q. Or with the processing of sugar, do you know?

A. That's correct.

(Testimony of Jack W. Hall.)

Q. What work is involved in the hauling of stones from the plantation fields on this sled in order to clear the fields? Will you describe that in somewhat more detail?

A. Well, the usual practice is to place the stones upon a sled which has a bridle on it which is attached to the tractors and they haul to the edge of the field or to some place where they want to pile the stones away from the fields. Sometimes they use in effect a rake approach to get the rocks out. I have seen tractors bulldoze rocks out of the field.

Q. Do you have anything further to add with respect to the work or activity of that employee?

A. I think not.

Q. Will you take the next in line, under 39, called a plowing employee, and give us information similar to that [311] which you have already given concerning the employee described in 38?

A. I think the same general information applies likewise to this employee. It is interesting to note that the word "field operations" in the fifth line isn't described. That could well be preparing the ground for laying portable track, which again is not actually the preparation of the soil or tilling or harvesting.

Q. In other words, that would be an operation on land from which no sugar crop, sugar cane crop, is to be produced, is that right?

A. Well, it might be over an area where sugar cane has been growing. It might run, make a road-way into a field, level the ground on which to lay

(Testimony of Jack W. Hall.)

portable track and to bring the cane out of the fields.

Q. Now, would your testimony concerning this employee, insofar as he works as a mechanic's helper in repairing tractors of various kinds, be the same, substantially the same as you have given the previous employee? A. That's correct.

Q. Now let's turn to the employee described, whose duties are described in No. 40. Will you testify concerning him?

A. The same thing is true as to this employee and the repair work he performs in the tractor shop. He may well [312] be performing repair work on equipment that is not used for planting, cultivation or harvesting.

Q. Will you discuss, Mr. Hall, that part of this employee's duties which involve operation of machines for pipe lines and drainage ditches for domestic pipe lines?

A. I would think the description is almost obvious. In operating the trench-digging machine for pipe line that supplies water for domestic purposes, he certainly isn't performing a function that has anything to do with the field operations.

Q. Have you concluded with No. 40?

A. I have.

Q. Will you turn to No. 41, then?

A. This employee, of course, in driving a truck does not actually come in contact with any of the cultivation or with the preparation or the actual

(Testimony of Jack W. Hall.)

harvesting of cane. His is a job of transportation.

Q. He is a teamster, in other words?

A. That's correct.

Q. He also works as a mechanic, does he, in the garage and elsewhere?

A. That's correct. On the same general situation as outlined in the 38, 39 and 40, it applies insofar as the garage work is concerned. [313]

Q. That is, his work is on all sorts of vehicles and equipment, much of which has nothing to do with actual production of sugar cane, is that your testimony? A. That's correct.

Q. Will you turn to No. 42 now and testify?

A. There is nothing in this description to indicate whether or not any of the water in the irrigation ditches is eventually used in the mill operations or in the boilers. If it were, it would not be agricultural—

Mr. Poole: I object to that answer. I think it leads to a legal conclusion. He has no right to state it.

The Court: Sustained.

Mr. Gladstein: Will you continue with your statement, Mr. Hall?

Mr. Poole: Your Honor, I want to make an observation, if I may. While counsel for defendants qualified or purported to qualify, I should say, this witness as being familiar with the over-all operations of the sugar plantations in the Territory of Hawaii, he did not qualify him as being familiar with the particular operations on the plantation of

(Testimony of Jack W. Hall.)

Waialua Agricultural Company, which are involved here. In fact, when you asked the witness as to whether or not he was familiar with the milling operations, he hesitated and said that he thought he had been in part of the mill once. Again when you asked him as to whether or not he was familiar with [314] the field operations, he said that he was familiar generally with all field operations but he didn't say that he was familiar with the field operations on Waialua.

Now you are asking the questions here that go to the specific duties of the named defendant employees, and I might say I am frankly unable to determine from the answers being given here as to whether or not the witness is testifying with respect to the particular defendants that are involved in this case or whether he is testifying generally as to what the job generally involves.

Mr. Gladstein: Well, let me ask one or two questions of Mr. Hall.

Q. Mr. Hall, in going through the descriptions, the job descriptions of this complaint, did you find that you were familiar with the types of duties and activities, familiar from a personal observation and experience with the types of activities described in this complaint?

A. That is true. I also found that in some respects the descriptions are not complete enough, and therefore somewhat misleading.

Q. Did you find, Mr. Hall, in your experience

(Testimony of Jack W. Hall.)

that these duties as described here are generally and substantially characteristic of or descriptive of similar duties or exact and identical duties and functions of activities of workers on various plantations in this area? [315]

A. That is the pattern throughout the industry. Whenever an operation becomes efficient on one plantation, it is quickly adopted on others.

Q. Has it been your experience, do you know, can you state, based on your own personal knowledge, of experience, whether or not there is any substantial departure from one plantation to another in respect of the types of functions, activities and job descriptions that we have described in this complaint?

A. Not substantially.

Q. Have you ever had it raised by any representative of Waialua or H.S.P.A. or any of the factors that the manner of operation in Waialua or the duties of the workers at Waialua are substantially different from the manner of operations elsewhere among the plantations, or the duties of the workers elsewhere?

A. No. As a matter of fact, it has been urged that it was typical.

Mr. Poole: Well, your Honor, the whole course of this examination, as I understand it, constitutes an admission that the witness here is not personally familiar with the activities of these particular defendants regarding whom he is giving testimony.

Mr. Gladstein: To the contrary, this is to establish that Mr. Hall's familiarity with the industry

(Testimony of Jack W. Hall.)

includes the [316] Waialua Agricultural Company, which is presented here as a more or less typical operation, and Mr. Hall is familiar thoroughly with these operations and his testimony has already been given as to how he gained that familiarity. I don't understand it, unless Mr. Poole is making a statement here—I haven't heard him make it—I don't understand that it is claimed that Waialua is unique and so different from other operations in this industry that only somebody who has been working at Waialua is qualified to testify on these matters. I don't understand him to say that. But if he is going to say that, why that would be very unusual and—not unusual but would frustrate the very purpose of bringing this case.

It isn't our purpose in this declaratory relief case to just get a determination for Waialua. That wouldn't solve anything. You'd have 30 odd other plantations that would still not have any authoritative statement as to where coverage lies and where it ends. The purpose of this proceeding was to get, first of all, a plantation which was sufficiently and substantially typical and representative, so that the decision in that case would apply to the rest of the industry. And that's why Waialua was picked out. And what aspect of its operation was supposed to be typical? Why the very things described here, your Honor, the duties of the men. [317]

Now, if the Court were to decide the issues here on the basis, for example, of a job title, I would certainly go along. The job title is different from plantation to plantation, and even different within

(Testimony of Jack W. Hall.)

a plantation from time to time. And there is nothing more deceiving than simply a title of something. It is the content or substance of the job, it is the particular duty or combination of duties that we are concerned with. That duty is to be found not only performed at Waialua but every place.

We, for example, we have presented here a statement that Mr. Augustine Lorenzo in performing his work does certain things. That is not typical or unique—somebody, not with his name, it is true, somebody on every other plantation does the same kind of work, either identical or substantially the same. He may not do the same combination of things, that is true. That's why we are not concerned with titles. We are concerned with the particular activity. And the activities of Waialua are the same activities that are to be found in the other plantations.

Therefore, Mr. Hall is eminently qualified to testify about these matters. And while I don't object to the ruling of the Court as to the last sentence of the last answer given by Mr. Hall, in which he said something was or was not agricultural, as to the rest he is giving testimony concerning facts, and I think he should be allowed to proceed, [318] your Honor.

The Court: Well, it doesn't seem to me to make any difference whether John Doe or Richard Roe or some other person performs any one of these operations that are specified and accredited before

(Testimony of Jack W. Hall.)

us. And also it seems to me that when it is said that an employee makes minor repairs on a 65-horsepower diesel tractor in the field and then at other times assists in the repair shop in making further and more substantial repairs, it wouldn't seem to me to make any difference whether that was on Waialua or whether it was on Ewa or Waipahu or on some other island. Wouldn't the operation that is described here be just about the same thing, as nearly as you could write it anywhere?

Mr. Poole: I am certainly unwilling to say yes to that. I know what the operations are, as the attorney who assisted in the preparation of this stipulation, out at Waialua. And I am not arguing here, your Honor, that if the operation that you have just described was performed out at Oahu or at Ewa, that it would make any legal difference. I mean the situation with respect to coverage under the Fair Labor Standards Act. Obviously, it would be the same. But what I am saying is this: We had 47 named defendants; you are going to have to determine whether the combination of duties performed by each one of these 47 individually named defendants are under the Fair Labor Standards Act. That is [319] the job which you have before you.

Now, it seems to me that any evidence that has to do with what each one of these defendants do is material. I would also say that any evidence that indicated the nature of one of these listed activities would be admissible, so that your Honor would be in a better position to understand. But I don't

(Testimony of Jack W. Hall.)

think that evidence that goes to so-called general character of a particular occupation which exists on all plantations or many plantations is at all relevant. In fact, you can't approach the job that you have here in that manner. It may be that one particular activity might defeat an exemption, and it is the combination of activities that in the last analysis is going to determine whether or not a particular exemption applies or does not apply. So those are the facts that you are going to have to get in the record.

The Court: Then from that statement it rather impressed me at first blush that that would put the burden on the complainant to show in detail that the operations were in toto such as would create the exemption. Now, the operations are defined here with just certain words and sentences. For instance, during the off season and at times throughout the year he cuts firewood for use as fuel by plantation employees living in the plantation villages, hauls stones from the plantation fields on sleds, and assists [320] as a mechanic's helper in the tractor repair shop in repairing tractors. Well, now, there is quite a lot of stuff covered there. Of course, I can readily conceive that the operation of cutting firewood might be entirely different on one plantation from another if they did cut firewood on all of them. And on some of them I don't believe they do. The operation of cutting firewood as assigned to each individual who went out to cut firewood might be entirely different. But if we have got to take these things by the manner in which they are

(Testimony of Jack W. Hall.)

described, why it seems to me that to tell what generally that operation would be and what would be involved in it, it would seem pertinent.

Mr. Poole: I don't think so, your Honor. Just look at what is going to happen to your record if you do that. Here is this first described job. He is a ratoon tractor operator. You have certain listed activities here that that particular operator is engaged in. Now, if you are going to permit evidence to be put in as to what the ratooning tractor operator normally does or generally does on all plantations, you are going to get a different category of work.

The Court: I rather took it, to start off, that it was or would be conceded that all operations of that particular nature, like ratooning tractor or cultivator operator in terms of the description applied particularly to cultivating [321] or planting operations, that that was conceded to be agriculture. But it is these other things that do or may bother me considerably in determining how they apply.

Mr. Poole: Well, you are correct in that. But I don't think you are correct in saying that you can pass upon these particular jobs here and determine whether they are under the Fair Labor Standards Act, or are not subject to exemption, by taking evidence generally as to what a particular job, a particular type of activity normally involves on each plantation or on all plantations generally. Now just take, for instance, the activity of transportation, cane transportation. I am talking outside of the

(Testimony of Jack W. Hall.)

record here. These facts are not in the stipulation here. You have cane being transported by flume; you have cane being transported from the field to the mill by train; you have it being transported by truck; and in some cases you have—

The Court: By cable.

Mr. Poole: —and in some cases by a combination of those methods. Now, out at Waialua we have only one method involved: transportation by train. Now, I am not arguing that if the Court holds that the transportation of cane by train is subject to the law, is not within the exemption, that any different ruling should be made for other types of transportation. I don't think that we would take that position. I'd be willing now to concede that if cane [322] transportation as a function or activity is held to be covered by the Act and not entitled to any exemption, that it ought to be treated uniformly as under the law. But it seems to me that it goes far afield, your Honor, when we get into the job description of the particular employee who, we will say, is engaged, as some are in this case, in transporting cane by train, working as engineers, as brakemen, and so forth, to bring in testimony with respect to all other types of transportation and what is the general custom on other plantations. I regard that as highly irrelevant. It has nothing to do with this particular case.

You must look, it seems to me, to the activities of these particular employees and on that basis determine whether the exemption applies.

(Testimony of Jack W. Hall.)

Now, in your comment before you said that certainly the Plaintiff must have the burden of proof because we were asserting that the agricultural exemption applies. I acknowledged that. The cases so hold. We do have the burden of proof. But we have submitted in this case a stipulation which was signed by counsel for the Defendants, and we think that that adequately describes the jobs for the purpose of performing the judicial function, that is, of determining whether or not the agricultural or the 7(c) processing exemption applies, or in the housing situation for the purpose of determining whether you have coverage or no [323] coverage. If they are not adequately described, I have no objection to going into further evidence as to what those particular employees are doing. But we certainly are not proceeding in the manner contemplated by the statute in any case I was ever in, when we bring evidence in here as to what was generally done by Joe Doaks over on some other plantation which is not a party, either Defendant or Plaintiff in this case.

The Court: Well, now, you set out here, both in the complaint and then it is legally reiterated in the stipulation, that these 30 odd workmen named perform certain duties, and some of them are more or less involved. And the question very clearly has been raised that the description isn't complete in some instances, to say that a man repairs the tractors in the field and then in the shop.

Mr. Poole: Yes.

(Testimony of Jack W. Hall.)

The Court: Well, it is material, I believe, to know what those tractors are used for, what caused the damage to them that would require repairs.

Mr. Poole: I agree with your Honor.

The Court: So that when you leave your case here just on the statement that a man performs these particular duties, why it is fair for the Defendant to go forward and bring in any other facts that are related to the duties that might put them in a different classification under this Act that [324] we are dealing with. Now, I don't know—

Mr. Poole: I have no objection to that, if that is what they are willing to do, but they are not doing it.

Mr. Gladstein: I even think, your Honor, that not only will we be entitled to have testimony as to additional facts concerning the job duties of the people in this case, or amplification, explaining, necessarily even adding a discussion of the duties by simply amplifying the nature of the duties involved here, but I think we also have the right to bring in testimony with respect to a similar activity on some other of the plantations in order to give the Court an opportunity to focus this, to place this particular man's work or the particular type of his work that we are talking about in focus, so that we will understand the function of that work to the whole. For example, as Mr. Poole said, transportation in some plantations, mainly the big island I understand, is a matter of using flumes. In other places they use trucks. In some places they use

(Testimony of Jack W. Hall.)

railroads or combinations, and so forth. Your Honor has mentioned a fourth one.

Now, it seems to me to be improper to say that this Court does not have the right to hear evidence that will show the relationship of a particular activity to the entire operation. Of necessity your Honor has a right to call upon evidence as to what happens in similar or related industries [325] in order to throw light upon the relationship of a particular man's activities. And there is plenty of law to support that.

Now, one more thing. In signing the stipulation with Mr. Poole here, I signed a stipulation for the purpose of shortening the case, signed a stipulation which constitutes a minimum agreement of fact. I didn't ask him to agree to other statements of fact. Either he would not agree to them or I didn't prefer to ask him to. But I am not obviously bound to confine myself to that which we stipulated. I can go beyond that. The agreement that we made originally, the original settlement, didn't pick out Waialua as the particular Company, didn't say we would test the question of coverage at one particular plantation. That agreement is in general terms. I don't happen to have a copy of it here but I will bring it to court. I asked counsel and counsel said he didn't have a copy of it. But that agreement contemplates a test case for the industry, not for Waialua as such.

Therefore that's another reason why your Honor would have the right to hear this evidence. And I

(Testimony of Jack W. Hall.)

think we would save time if we didn't worry about the fact that Mr. Hall, being a layman, might occasionally say, well, this isn't agricultural. I think we all understand that that kind of a statement isn't going to be binding on this Court or on [326] any appellate court. And since it can't possibly mislead a jury, I think we would save time if we didn't worry about the fact that some such statement may creep into the record. It is not going to prevent this Court from making up its own mind on the law.

The Court: Well, let us go ahead with the examination. I don't mean by that to suggest that you limit your objections on the striking of any statement made by the witness that you do object to.

Mr. Poole: Well, if the Court please, I'd like to have the reporter note that I take an objection to all this testimony. I don't regard it as proper because the witness hasn't properly qualified himself to testify in respect to the operations at Waialua, and he is not confining his testimony to the description of the named Defendants. Therefore, I object to what he is saying.

The Court: Well, the witness is referring to the statement as to the work performed by a particular defendant, so far as we go along, and telling his views as to what is involved in these work transactions. The objection is overruled.

By Mr. Gladstein:

Q. Will you turn to No. 42, Mr. Hall, and testify concerning the activity of that employee?

(Testimony of Jack W. Hall.)

The Court: Thirty what?

Mr. Gladstein: Forty-two, paragraph 42 on page 33. [327]

A. I must confess, your Honor, that this legal argument leaves me a little cold. I am trying to indicate in these job descriptions where they are incomplete and where they are misleading. And in the case of No. 42, Augustine Lorenzo, the description indicates that all of the water is used exclusively for irrigation purposes. Employees similarly situated on many of the plantations are handling water that is also used for mill purposes.

Mr. Poole: Your Honor, I ask that that statement be stricken. We have a stipulation here to a fact; that he says that that fact is not in accordance with the facts on the other plantations. That is completely irrelevant.

Mr. Gladstein: I don't understand. He said that there was a statement. Which statement here, Mr. Hall, did you think indicated that the water that this man has to perform some work in connection with is used solely for agriculture?

The Witness: Well, in the first sentence it indicates that he receives, transmits orders for the amount of irrigation water to be received to the plantation each work week period from the reservoir. And further, he is responsible for the proper maintenance of the irrigation canal system under his charge.

Q. Well, let's see if I understand your testi-

(Testimony of Jack W. Hall.)

mony. Is it this, Mr. Hall, that this employee may well from this description—it's given here—spend energy and devote time [328] and perform work in connection with water that is used for purposes other than irrigation of the fields?

A. That is what I am trying to say. It's rather difficult.

Q. What other purpose, for example?

A. Some of it might be used in mill operations. Some of it might be used in washing cane in mills.

Q. Would any of it be used for domestic purposes?

A. In many cases, yes. Water is taken directly from irrigation ditches for domestic purposes.

Mr. Gladstein: Now, it would be our position, your Honor, with respect to work that relates to water used for purposes other than agricultural purposes, such as irrigation described in paragraph 42, that such work would not be exempt.

Q. Now, would that testimony you have given Mr. Hall, be equally true of water measurement status?

A. I didn't hear the question.

Q. That is, checking water measurement status.

A. That is true, so long as part of the water is going towards an irrigation——

The Court: Now, you see the difference here. Mr. Hall construes this as being an allegation that this employee operates the water system or part of it for irrigation purposes only. Well, now, he raises a conjecture that some [329] of that might

(Testimony of Jack W. Hall.)

be used for other purposes. Well, that isn't in the nature of any proof. It is just a supposition that in the ordinary course might be had. I can't consider that sort of a thing. If it is known, that it is possible that this defendant here who is named, that we are dealing with, that he might be able to testify of his knowledge that some of that water goes to irrigation, irrigating other crops, or outside or into the mill for certain purposes there which you claim is not agriculture nor processing, but this witness can't testify to that nor give the Court any legal evidence.

Mr. Gladstein: Your Honor, I think that he has given all that your Honor needs. In other words, if our interpretation of the law is accurate, then this particular employee that we are talking about, not as an employee but insofar as specified duties are concerned, the Court might well say those are exempt duties, provided when we are dealing with water the water is used for irrigation purposes, period. Mr. Hall pointed out not necessarily that this employee works in respect to water that goes for other purposes but he pointed out that that does have it. Therefore, all that we need in terms of a declaratory relief judgment is for the Court to say, based on the evidence, if such an employee, any employee who is doing this kind of work performs activities in respect of water which is used [330] for purposes other than this, for example, A. B and C, then such employee is not exempt.

(Testimony of Jack W. Hall.)

The Court: That is not the issue here. You make the allegation that this water that this employee deals with is used for irrigation purposes. Now, that stands until it is overthrown.

Mr. Poole: Your Honor, he has attempted to get an adjudication on a hypothetical set of facts which the courts have never permitted. Now, he has everything he wants, as I understand him. If he gets an adjudication on the job descriptions that we have in the stipulation, because there is nothing said in the description about water going for any other purposes than for irrigation—that being true, if the Court holds that that particular job is agricultural, necessarily it is on the basis that the water was being handled by that man, being gauged by that man, was being used for irrigation purposes, and you have what you want. But this idea of putting conjecture upon conjecture as to what possibly the job might be involved in, it seems to me is entirely improper. I have never seen any rulings of the courts that permitted it. It is asking for an adjudication upon a hypothetical set of facts. And that isn't even permitted under the declaratory judgment act.

Mr. Gladstein: I can't see what all this argument is about, Judge. Mr. Hall has testified to a fact which is [331] that the men do this kind of work, do perform work in connection with water that is used for purposes other than irrigation purposes. Now, maybe Augustine Lorenzo during the

(Testimony of Jack W. Hall.)

last year falls in one category and maybe the year before that in another, and it may change from time to time. I can't see that there is anything hypothetical about what we ask. But if what Mr. Poole is suggesting is something like this, maybe we don't have any disagreement: If he is stating that a finding in favor of exemption on the part of Mr. Lorenzo would be based upon the fact that the water is used for irrigation purposes only, and that the Court by thereby granting an exemption would not be supporting an exemption for work in connection with water, the use of which goes beyond irrigation, perhaps we can stipulate and pass on. Is that all right?

Mr. Poole: I am willing to agree that the Court in passing upon the description here doesn't by implication hold that those particular jobs are either covered by the Act or entitled to an exemption, if the activities are absolutely different. I think that the decision rests wholly upon the facts as stated in the stipulation. And I am willing, Mr. Gladstein, to stipulate to this fact, that in so far as the decision of this Court is concerned, and as based upon the stipulation which counsel for the parties have signed, that it necessarily doesn't go beyond the facts [332] that we have agreed upon. And that includes this job that is now under discussion, as the others.

Mr. Gladstein: Well, we were talking about this particular job and I thought perhaps we could get

(Testimony of Jack W. Hall.)

a specific stipulation, because our position on this man, your Honor, is this: We think that the description of the duties in paragraph 42 are agricultural except insofar as the man may spend time performing work in connection with water, any part of which is used for purposes other than irrigation. Now, I will offer a stipulation with Mr. Poole on that, if he wants to enter into it. We can pass by No. 42.

Mr. Poole: No, I will not stipulate on that particular point because I am not familiar with the disposition of the water.

The Court: He sends water out into what?

Mr. Poole: What is described as "in proper proportion to the various delivery ditches on the plantation." Well, that might mean a great many things. I can't tell. Your Honor, I am willing to put a witness on at the conclusion of the testimony that is being taken or offered now by the defendant and supplement any particular job here that you feel is inadequately described. And I certainly will do so on this particular job.

The Court: All right. [333]

By Mr. Gladstein:

Q. Let's turn to No. 43, Mr. Hall. You have it, concerning the duties and activities set forth there?

A. This job is a steam pump operator, is a relatively highly-skilled job requiring a great deal of training and experience, and as far from having any direct connection with the cultivation and harvesting of sugar cane—

(Testimony of Jack W. Hall.)

Q. Where is the work performed?

A. In a building that houses the pump.

Q. Can you describe generally what this apparatus is that this man works, what his duties are?

A. Well, that's a boiler, of course, with a fire box under it for heating the water to steam. The steam in turn turns a pump, pumping the water.

Q. To what parts of the plantation do the consequences of this man's work go to? Well, I'll withdraw it.

Mr. Poole: You withdraw the question?

Mr. Gladstein: Yes, I withdraw the question.

Q. Is there anything else you want to add to 43, Mr. Hall? A. No, I don't think so.

Q. Turn to No. 44, please.

A. I think that description is adequate. It expressly points out that he is doing other work than making fire bricks and fighting fires and pushing cane into where the [334] regular cane loading machine can pick it up. That is, of course, he bulldozes track lines for the laying of portable tracks. I have no comment on that.

Q. Now, what about the work that he performs when he is hauling cane over tracks, will you tell us about that, and particularly how?

A. Well, in that connection it is much the same as the locomotive engineer's job. It so happens that in laying portable track the track isn't stable enough to run a heavy locomotive out there, so it is necessary to hook a tractor to haul the cane cars

(Testimony of Jack W. Hall.)

into the main line where the locomotive picks it up and takes it into the mill.

Q. Now, the hauling of this cane occurs after it has been picked up at various parts and points in the field, is that right?

A. That's right. It's at a central point and it is picked up with a cane loader and loaded into the cane cars.

Q. So that the work that this man performs when he is hauling cane over portable tracks occurs after the cane has been placed in a central point of concentration, is that right?

A. That's correct.

Mr. Poole: Your Honor, the testimony that has just been given is in the nature of a legal conclusion. He said that the cane was picked up after it was placed in a central [335] point of concentration.

Mr. Gladstein: Well, you want to describe the point of concentration?

Q. Will you do that, Mr. Hall? Describe what you meant by central point of concentration or point of concentration.

A. Well, that's where the cane loader picks up the cane to put it in the cane car to bring it into the mill.

Q. What methods are used, are known to be used in this industry?

A. Well, there's various methods. Generally, the procedure is to have a cane loader pick up the

(Testimony of Jack W. Hall.)

load and place it in the car. On other places in the industry the cane may be——

Mr. Poole: I object, your Honor, what the practices are, to testify as to the rest of the industry.

The Court: Well, how does it get into piles ready for the cane loader to take it?

Mr. Poole: Your Honor, I should like to comment upon that. This testimony that is now being given is contradicting some of the basic things that are set forth in the stipulation.

Mr. Gladstein: Where?

Mr. Poole: It is basic, as you know, that a party is not permitted to contradict or impeach his own witness. [336] And I take it that that same rule applies where the parties had entered into a stipulation. Now, the stipulation——

Mr. Gladstein: Why?

Mr. Poole: Just a moment, Mr. Gladstein. This stipulation shows very clearly that in this particular operation, unlike many others I am sure with which Mr. Hall is familiar, the cane is pulled out of the ground as it were by a large grab that operates on a crane and is placed directly into the cars.

The Court: Does the stipulation set that out?

The Witness: That isn't always true. The stipulation says so.

Mr. Poole: In some situations there is some cane that is bulldozed. And that is for the purpose of making a roadway for the portable track. But the great bulk of it is loaded directly into cane cars

(Testimony of Jack W. Hall.)

by cranes which pick it up in its standing position. That is set forth in the stipulation under the provisions that have to do with harvesting.

Mr. Gladstein: Well, the fact that they use both methods, your Honor, doesn't mean that Mr. Hall's testimony——

Mr. Poole: Well, Mr. Hall is testifying entirely, to an entirely different thing, and he is tending to discredit the stipulation.

Mr. Gladstein: We are not trying to discredit the [337] stipulation but adding to it and explaining.

The Court: Well, that is set out in the stipulation in paragraph number what?

Mr. Poole: It is on page 21, your Honor.

The Court: Of the stipulation?

Mr. Poole: Yes.

The Court: No, no, I mean the duties of this man.

The Witness: Forty-four.

The Court: Forty-four? Forty-four is a steam pump operator under the stipulation. They are not the same numbers in the complaint and the stipulation. I think they vary.

Mr. Poole: They vary by one number.

The Court: What is the name?

The Witness: Tadao Watanabe.

The Court: Oh, yes, 45, listed as a rake operator.

(Testimony of Jack W. Hall.)

Mr. Poole: Your Honor, do you have the stipulation before you?

The Court: Yes.

Mr. Poole: I should like to call your attention to the paragraph that starts at the bottom of page 80 and continues through.

The Court: Page what?

Mr. Poole: Page 80 and continues through to the top of page 81. Now, it is stated in that stipulation that [338] "the work and duties of each such person are to be considered as further described by Part I of this stipulation to the extent that Part I is related and applicable to the particular work and duties described for such person in Part II."

In other words, the general part of the stipulation has to be read in connection with the activities of each of the individually-named defendants. So when you have a job description that relates to cane harvesting or cane loading or cane transporting, that in turn has to be read back in connection with the over-all and general description of the operation on the plantation.

Mr. Gladstein: I confess I don't understand why Mr. Poole is so excited. I just want to have Mr. Hall testify to the fact and let the Court pass on the application of the law and the facts. If there are, as there are apparently, two methods of getting the cane into cars, one by grab system and the other even to a lesser extent at Waialua—it doesn't matter—and the other by piling it in piles

(Testimony of Jack W. Hall.)

and having those piles lifted or pushed onto and into the cars, let us have the facts and the Court can pass on the facts.

Mr. Poole: I have no objection to that, your Honor.

Mr. Gladstein: That's all we are trying to do.

Mr. Poole: But the testimony was clearly to the effect that the cane was placed in some concentrated form, as [339] your Honor's question indicated, and that isn't a fact. It is loaded.

The Court: Well, it says that this cane is bulldozed into piles so that it is available for regular cane-loading machines. That would indicate to my mind that it was concentrated at some point.

Mr. Poole: Well, that's only the cane that is under the telephone lines, as indicated.

The Court: Yes.

Mr. Poole: On Page 21 it states as follows:

"The cane is loaded on the cars by caneloading machines. These machines are caterpillar cranes weighing approximately 23 tons equipped with a 40-foot boom and a finger-like grab which pulls or grabs the cane loose from its growing position and loads it directly into rail cars."

The Court: But that has nothing to do with this man's duties.

Mr. Poole: That's right.

The Court: He commences where that ends.
By Mr. Gladstein:

Q. Will you continue, Mr. Hall?

A. I think that completes employee No. 44 here.

(Testimony of Jack W. Hall.)

Q. Well, I had asked you about the placing of cane in piles, to describe that operation if you would.

A. Well, I think the stipulation is clear enough, [340] that it is pushed by this, that it is pushed by this, pulled by this rake operation into piles and then picked up by the cane loader and placed in the cane car.

Q. At some subsequent point, is that right?

A. That's right.

Q. Now, will you turn to employee No. 45 and testify concerning his activities?

Mr. Gladstein: Your Honor, I am purposely not asking Mr. Hall to discuss some of the activities of employee No. 44, such as cutting firewood and other things which are similar to or the same as duties of employees that he has already testified about.

The Court: I think that can be understood, that where a particular operation is gone into in the case of one employee, if the identical thing is mentioned as to another that we can assume that it was the same operation.

Mr. Poole: I would agree that the agricultural character of it or the 7(c) processing character of it would be the same.

Mr. Gladstein: Or the non-7(c) and non-13(a) (6) would be the same.

Q. All right, Mr. Hall, will you turn to No. 45 please?

A. I think in No. 45 it is clear that the employee operating a portable track plow, which seems to be

(Testimony of Jack W. Hall.)

an [341] agricultural implement, is not performing any functions that have to do with preparation of the soil, planting, cultivating or harvesting of the cane, and it is similar to the job described earlier.

Q. That we called transportation, is that right?

A. That's correct.

Q. What about No. 46?

A. This operation consists of operating a boom tractor that picks the portable track up from usually a railroad car that's been run out to the end of the line and picking that track up and laying it on the field so that it can be fastened together by the portable track crew for the cane cars to follow into the field, and in picking tracks up after the field has been harvested and placing them back on the conveyance that brought the track out.

Q. Is it similar to the work of a section hand of a railroad company?

A. Well, I haven't seen any of those operations but I would assume from what I have read that it is a similar operation.

Q. This man himself, who does not directly perform any work or use any tools in the performance of work that runs anywhere between tilling the soil and harvesting the crop—

Mr. Poole: I object to that question. This is a [342] leading question. This is your witness.
By Mr. Gladstein:

Q. Well, I will ask you if that is a correct statement?

A. It is.

(Testimony of Jack W. Hall.)

Q. Well, now, will you turn to No. 47. I'll try not to be leading but sometimes it shortens the case.

A. In 47, as indicated earlier in the stipulation the cane-loading machine at Waialua is a grab apparatus and it breaks off the cane and loads directly into the cane cars except where it is picking up the cane as it's been piled by the rake from out of the way places, out of the way corners and things of that kind. There is one more item here. During the off season in the cleaning of, in operating the shovel machine to clean reservoirs and various irrigation and drainage ditches, I'd like to point out that reservoirs are also used for domestic purposes, and the stipulation does not show whether these reservoirs contain water used exclusively for irrigating cane.

Mr. Gladstein: I might say on this employee, your Honor, that we ourselves have had considerable problem, and this is it. They have apparently integrated or combined two tasks with respect to the cane loading machine operator at Waialua. One of these tasks is usually the end of the harvesting. The other is usually the beginning [343] of a transportation set-up or activity. And here what they have done is to combine the two and complete the last act of harvesting and the first act of transportation into one. Now, that raises a question in our mind of coverage. We feel that to the extent that transportation is not a part, not a part of agriculture, and there is a decision that transportation to the mill is incidental to the mill activities rather

(Testimony of Jack W. Hall.)

than incidental to the field or agricultural activity, —I'll have occasion to refer to that in briefs—to that extent this man is apparently performing a combination of tasks, one exempt as agriculture and the other not exempt as agricultural. And therefore, I make that point that we would claim under our theory that this man is not exempt by reason of the fact that he performs certain work which is not exempt, although in that very same activity he is performing work which otherwise under a different set of circumstances might be regarded as exempt, as agriculture. And that, of course, applies to all of the work that he does.

The Court: Several others that would come under your claim of that same thing?

Mr. Gladstein: Yes, that's correct, your Honor. In other words, whenever this happens, whenever this activity happens this way.

Q. Now, you want to turn to No. 48, Mr. Hall?

Mr. Poole: Your Honor, I should like to ask counsel whether I correctly understood him to say that the loading activity was an activity which under his claim was not agricultural?

Mr. Gladstein: The loading into cars that are taking the cane to the mill is transportation.

Mr. Poole: Is transportation? I just wanted to get that clear.

By Mr. Gladstein:

Q. Will you refer to No. 48, Mr. Hall please?

A. No. 48, the operation here is almost exclu-

(Testimony of Jack W. Hall.)

sively the same operation described for some of the other employees that were doing it incidentally, that is, hauling empty cane cars into the field and pulling cane cars off the field, and I don't think it's necessary to go into that any more.

Q. It is part of the transportation?

A. That is right.

Q. There is one activity which is direct field work by this man, that is, weeding or cultivating. You notice that?

A. Yes, that's true.

Mr. Gladstein: Our position would be that the weeding and cultivating, of course, is agriculture but the rest of it is not. [345]

Q. No. 49, Mr. Hall?

A. There again the employe is engaged in not preparation of the soil or in planting or in cultivation or harvesting but almost exclusively in grading roads in the field and in the village. He also spends time, of course, in, exclusively in some work weeks, according to the description, in preventing the run-off of irrigation water, and that has to do with the cultivation and irrigating process.

Q. That is, if the water is used solely for that purpose?

A. That's what the stipulation says.

Q. What about No. 50?

A. That's straight transportation except when he is making repairs.

Q. And when he is making repairs that would be

(Testimony of Jack W. Hall.)

connected with the instrumentality of transportation, namely, road work?

A. Equipment used in transportation.

Q. Fifty-one—by the way, let me ask you about No. 50, whether you can tell us if his duties are all performed in that transportation stage that occurs between the harvesting and the processing in the mill, or whether it also is performed in part on that transportation stage that commences after the sugar is coming out of the machines and [346] mill?

A. Well, he does not only that but he also hauls supplies into the plantations.

Q. So that he works in both transportation setups or stages, is that right?

A. That's correct.

Q. Now, what about No. 51?

A. This employee is engaged exclusively on work in connection with the transportation system, that is, on the track system.

Q. He is the railroad section hand I was referring to awhile ago, is that what he is called?

A. That's what they call him.

Q. Now, what about No. 52?

A. Flagman work also has to do with the protection of the general public, to make sure that they don't get in the way of moving transportation, although that seems to happen on occasions. And it is not doing any work in connection with the cultivation or harvesting of sugar cane, and the weeding that he does has nothing to do with the sugar cane.

(Testimony of Jack W. Hall.)

It is merely on the railroad right of way.

Q. Does it have anything at all to do with the processing of sugar cane in the mill?

A. No.

Q. Turn to the next employee. [347]

A. This employee's duties are divided between the transportation activity and the activity in processing the cane. On days when he is unloading the cars as they come in and cleaning up around the loading station, getting the empty cars out, he is engaged in transportation; he is acting as a watchman on the wash carrier, and then he is not engaged in transportation.

Q. That is, he would then in respect to that activity be connected, be doing things in connection with sugar processing, is that what you mean?

A. Well, he'd certainly be, I would say that is so.

Mr. Gladstein: Does your Honor want to stop now? I see that I have run over the time.

The Court: That's all right. If it is convenient, we will call it a day. You got down to 53. You covered 53. You are down to 54. We will continue this case, then, at nine o'clock tomorrow morning.

(The Court recessed at 1:05 o'clock p.m.)

Honolulu, T. H., September 19, 1947

The Clerk: Civil No. 787, Waialua Agricultural Company, Limited, Plaintiff, versus Ciraco Maneja and others, for further trial.

JACK W. HALL,

a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Direct Examination
(Continued)

By Mr. Gladstein:

Q. Mr. Hall, as we suspended yesterday you completed your testimony concerning the employee whose duties are set forth in paragraph No. 53 of the complaint. Will you now turn to the next paragraph and testify with respect to the duties of that one?

A. Insofar as employee 54 is concerned, Bernabe Hernandez, most of it, he appears to be working in a cane-cleaning plant performing work in connection with the actual processing. It is clear that part of his operations have to do with bringing the full cane cars into the cane-cleaning plant and taking the empty cars out, which under our theory is transportation.

Q. Nothing is done to the cane as such during the period when it is in the course of transportation in these [349] cars in or out of the mill, isn't that correct?

A. It is merely shunting the cars around.

(Testimony of Jack W. Hall.)

Q. And with respect to the off season?

A. During the off season he is not doing any work connected with the processing. He is engaged in actual repair of the machinery.

Q. All right, will you turn to the next one?

A. This employee is not doing any work in connection with the actual processing as we see it. He is engaged in transporting waste material away from the mill.

Q. A truck driver?

A. "Teamsters" is the usual term.

Q. No. 56?

A. I think it is conceded that this employee is engaged clearly in processing except during the off season. He is repairing equipment.

Q. What about 57?

A. On 57, this employee is engaged in mill processing during the week-end. The mill is shut down and there is no processing going on when he is making minor repairs, cleaning vacuum tubs and the like.

Q. Fifty-eight?

A. The same situation is true of 58, that is, during the week-end shut down there is no processing going on and he is engaged in doing general repair work. [350]

Q. Is the shutdown for week-end repairs typical characteristic of the industry?

A. The industry generally shuts down for a 24-hour period in each week.

(Testimony of Jack W. Hall.)

Q. Is it the same in all plantations?

A. Generally the same.

Q. During the shutdown, as I understand it, no processing of sugar at all is taking place, is that right?

A. Correct.

Q. What about No. 59, Mr. Hall?

A. The same situation is true on the week-end work. No processing is going on.

Q. Same thing about the off season?

The Court: You said no processing of sugar during the week-end shutdown. Does sugar include molasses and liquid sugar in every form—syrup?

The Witness: No grinding, that is, the crushing of the juice out of the cane, there is no boiling operations going on, none of the centrifugals are in operation, none of the bagging operations are going on.

A. (Continuing): We are on 59. Same is true of this employee on week-ends when no processing is going on. He is engaged in operations that are repair work and cleaning work.

Q. That's also true about off season? [351]

A. As to this employee, I don't know where he works during the off season.

Q. All right. Take the next one.

Mr. Poole: Which number are you on?

A. I have just finished 59. On 60. He likewise is engaged in cleaning work on week-ends and no processing is going on. During the off season he is likewise engaged in operations that are not being conducted in conjunction with processing.

(Testimony of Jack W. Hall.)

Q. Sixty-one?

A. On 61, he is engaged in bagging sugar but also after the sugar is bagged he is engaged in an operation that is similar to warehousing work, that is, he is either stacking it directly into railroad cars, shipping, or he is stacking in warehouses for temporary storage.

Q. Is it true that the time that employee performs duties involving, as the stacking of bags of sugar, and so on, that the sugar cane has been completely processed into sugar prior to that stage?

A. Processing operation is complete when it goes either into the bag, if it is coming directly, or into the temporary storage bin before it is bagged.

Q. Any further testimony concerning employee in paragraph 61?

A. Except that during the off season, of course, [352] none of his work is in connection with processing.

Q. Sixty-two?

A. In connection with 62, the fire room employee, Dionicio Carrit, it should be noted that the steam pressure generated in the fire room goes for the operation of power plant machinery, and back in 24 of the stipulation, paragraph 24 of the stipulation it points out that the electric power from this machinery is used for other operations than processing.

Q. Anything further on that employee?

A. No, that's all.

(Testimony of Jack W. Hall.)

Q. Sixty-three?

A. Point out in connection with this employee that the electricity generated by the power plant is used for other purposes than processing.

Q. Sixty-four?

A. Well, this employee's duties cover the whole range of plantation activities whenever there is machine shop work, and much of it may be for the mill and much for field equipment, some for transportation equipment, and his work is not exclusively in connection with the processing operations.

Q. Or in connection with agriculture?

A. Or in connection with agriculture.

Q. Sixty-five? [353]

A. This employee making repairs on locomotives is making repairs on all locomotives which may be used either in transportation of cane from the field to the mill, it may be used to transport supplies on the O.R. and L. lines to Company warehouses. It may be used in hauling sugar after it is refined to the O.R. and L. lines where it is taken—

Q. You mean after it reaches the raw sugar stage? A. After it is bagged.

Q. Anything else?

A. On 66, note that the operations of the welding shop include the whole range of plantation activities. It may be doing welding work on equipment used in the actual cultivation and harvesting or transportation equipment or in the processing operations.

Q. Sixty-seven?

(Testimony of Jack W. Hall.)

A. Note in connection with this employee, while he repairs and makes parts for field equipment, that field equipment is used in operations other than the preparation of the soil, the cultivation and harvesting. It is also used in some of the transportation operations. It is also used on occasion in road building.

Q. Sixty-eight?

A. On No. 68 the repairs that this individual makes to auto and truck radiators is for autos and trucks that [354] are to be used throughout the whole range of plantation activities, not exclusively for field operations.

Q. In other words, any or every aspect of the social, economic, recreational and other phases of the life of the entire plantation, would that be right?

A. That would be generally correct.

Q. Next number?

A. On 69 the cane-loading machinery, cane-loading employee, I think we should note that the cane loaders that he is repairing are used in connection with the transportation operation, as I explained the other day, yesterday.

Q. Seventy?

A. On 70 just note that tractors are used in operations other than the preparation of the soil and the harvesting of the cane, planting and harvesting of the cane.

Q. Seventy-one?

A. Well, this employee performs work on ve-

(Testimony of Jack W. Hall.)

hicles that are used throughout the plantation operations, as noted in the stipulation.

Q. Next?

A. On 72, Antone Robello, the fuel and lubricants and water he delivers to plantation field equipment, is to the equipment that is also used in operations other than the actual preparation of the soil planting and harvesting.

Q. Proceed. [355]

A. On 73, note that in supplying fuel oil for plantation bathhouses, supplying fuel oil for bathhouses used by all types of employees in the Company.

Q. Proceed.

A. Seventy-four, I think the stipulation is very detailed. Seventy-five, this employee is engaged in doing carpenter work on all phases of, most phases of plantation activities. In connection with the transportation activities and in connection with the cultivation activities and, of course, in connection with the water supply system of the plantation, water that is not used exclusively for irrigation. In 76 I think the stipulation is complete. The same is true of 77. Seventy-eight is complete. On 79, well, this employee while engaged in primarily in making analyses of juices and the like in the mill, also assists in making analyses of the nitrogen and moisture content of the actual cane from the fields. In making those analyses she doesn't change the character of the cane any. It is still there in the fields. And it is not part of the cultivation of cane. The

(Testimony of Jack W. Hall.)

same is true of employee 80, actually engaged in a chemistry process.

In 81 the description is very broad and I think complete. I have nothing to add to 82. The same is true of 83. On employee 84 I have nothing to add.

Q. Eighty-five? [356]

A. And on 85 I think the description is quite complete.

Mr. Gladstein: Mr. Poole has agreed to stipulate with me as to the authenticity of a document which I desire to introduce in evidence. The document is entitled "Labor in the Territory of Hawaii, 1939, Bulletin No. 687." It is a publication of the U. S. Department of Labor, Bureau of Labor Statistics. It carries the imprimatur of the United States Government Printing Office, Washington, 1940, and is officially known as House Document No. 848, 76th Congress, third session. It appears in the report itself, in the publication itself, that House Resolution No. 519 was adopted in 1940 ordering this report printed as a House document. I understand that the authenticity has been stipulated to.

Mr. Poole: May I examine it, your Honor? I don't think I shall have any objection to it. (Mr. Gladstein hands a book to Mr. Poole.) I have no objection.

Mr. Gladstein: With your Honor's permission I'd like to withdraw, have the document marked and then withdrawn by leave of Court for two reasons: first, this is our only copy; and secondly, we have marked it up and, of course, I don't want

(Testimony of Jack W. Hall.)

private markings to be thought to be evidence in the case. I understand the Territorial library has a copy and I am wondering whether I could supply a clean copy [357] at a later date. I'd have to write to the Department of Labor and obtain it. If I cannot do that, then I will undertake to make erasures of the things that have been written here and introduce it.

The Court: Well, you are offering it now?

Mr. Gladstein: Yes, I am, your Honor.

The Court: All right. It may be received in evidence as exhibit what?

The Clerk: Defendants' exhibit No. 1.

The Court: Exhibit what?

The Clerk: One.

(The document referred to was received in evidence as Defendants' Exhibit No. 1.)

The Court: Subject to the withdrawal and the substitution of a similar document, and that the notations in handwriting are not part of the exhibit.

Mr. Gladstein: Yes, your Honor. Would it be convenient for your Honor to take a very brief recess at this time?

The Court: Yes.

(A short recess was taken at 9:30 a.m.)

After Recess

Mr. Galdstein: Your Honor, I understand this to be the fact, that I stated and asked counsel to stipulate to it as a fact that the only plantation in the Territory which is not a member of the Ha-

(Testimony of Jack W. Hall.)

waiian Sugar Planters Association [358] is the Gay and Robinson Plantation, is that right?

The Court: I believe there is another.

Mr. Gladstein: Waianae and Waimanalo are also not in the H.S.P.A. That's the fact. Will you stipulate to it?

Mr. Poole: Your Honor, I am willing to stipulate to that fact but I don't see its relevancy, and in order to protect my record that I should offer an objection to it, but I have no objection to stipulating to it. And he hasn't pointed out why it is relevant to this case.

Mr. Gladstein: Well, does your Honor wish me to express my theory of the relevancy of it? I think I disclosed that in my opening statement. It is my contention that we do not have in the Territory farmers engaged in agriculture. We have manufacturers of sugar, and it goes beyond the manufacturing of raw sugar. It goes actually to the point of refining sugar and marketing that refined sugar in the United States. And in the evidence that was received this morning, the publication of the Department of Labor entitled "Labor in the Territory of Hawaii," there are statements of fact which are evidenced in this case to the effect that approximately 60 per cent of all of the unrefined sugar produced by the plantations in Hawaii is refined by the California and Hawaiian—what is that Company?—refinery at Crockett, California. [359]

The Court: That can't be so.

Mr. Gladstein: Beg your pardon?

(Testimony of Jack W. Hall.)

The Court: That can't be the fact.

Mr. Gladstein: It so states. And I understand——

The Court: Some of it goes to Western.

Mr. Gladstein: Yes, I said approximately 60 per cent.

The Court: Oh, I beg your pardon.

Mr. Gladstein: Approximately 60 per cent is refined at C. and H. at Crockett, California, and the C. and H. Company is a cooperative which is wholly owned and controlled by the Sugar Plantations here in the Territory. It is true that another portion of the sugar is refined at the Western Sugar Refinery, which I think is in San Francisco. And another portion at some eastern refinery.

Mr. Poole: Your Honor, I still can't see the relevancy of this particular evidence. The purpose of this suit is to determine the application of the Fair Labor Standards Act, to name defendant employees—it's been agreed by the parties that none of those employees have anything to do with refining. Their activities cease with the making of the raw sugar and its delivery to the O. R. and L. That is so stated in the stipulation. And he still hasn't explained how this other evidence is relevant. So I still want to note my objection to the testimony.

The Court: Well, the evidence hasn't been offered. [360] He, as I took it, asked you to stipulate to a statement as being a fact without regard

(Testimony of Jack W. Hall.)

to whether it was evidence or not. And it hasn't been offered as evidence before us. Unless it should be through the pamphlet, the bulletin.

Mr. Gladstein: I can't pick any statement out of here offhand. I will withdraw that.

Q. Mr. Hall, were you personally present at a hearing held in 1941 before the Bureau of Unemployment Compensation of this Territory?

A. I was.

Q. Did you testify to that hearing?

A. I did.

Q. And what in general was the purpose of the hearing?

A. The purpose was to determine the reasonable value of perquisites under the Unemployment Compensation Law.

Q. Were representatives of the Waialua Company, the plaintiff in this case, present at that hearing?

A. Well, there were representatives from the Hawaiian Sugar present.

Q. And if the record shows that Mr. J. O'Donnell and Robert W. Taylor were present——

A. I recall Mr. Taylor being present.

Q. You testified there as a union representative?

A. I did.

Q. And the subject matter was the question of the [361] cost of perquisites, is that true?

A. That is correct.

Q. Now, after the hearing, were you supplied

(Testimony of Jack W. Hall.)

with a copy of the transcript? A. We were.

Q. A record was being made of the testimony and of what took place at the hearing, is that right?

A. That's correct.

Q. And after you received a copy of the transcript did you read it? A. Many times since.

Q. And your recollection is what as to whether or not that was a true transcript of what had taken place, of what had been said?

A. I believe it was a true and correct transcript of the proceedings.

Q. Now, I want to read to you from a copy of the transcript a small portion and ask you whether to your recollection that statement or the statement in substance was made at the time and place indicated, namely, February 13, 1941, at this hearing that I have referred to at 217 South King Street, Honolulu, whether you heard Mr. Frederick Simpich, Jr., give testimony on behalf of the H.S.P.A. and its members? A. I do. [362]

Q. And did he or not make the following statement in part: "As you no doubt are aware employees of sugar plantations are required by their employers to live on the plantation premises in quarters furnished to them. The quarters are furnished for the convenience of the employers in order to have the employees available at all times to insure the proper and efficient operation of the plantation."?

A. I recall that statement in substance quite

(Testimony of Jack W. Hall.)

vividly because we have used it many times since in our publicity.

Mr. Gladstein: That's all. Cross-examine.

Mr. Poole: Does the defendant rest with the case?

Mr. Gladstein: I said you may cross-examine.

Cross-Examination

By Mr. Poole:

Q. I think you stated, Mr. Hall, that you presently held a position with the I.L.W.U.?

A. That's correct.

Q. What was that position or is that position?

A. Regional director for the Territory of Hawaii.

Q. Could you state in a very general way what your duties are in that capacity?

A. My duties in that capacity are to apply the policy of the international union as laid down through the convention through the executive board and through the international officers to whom I am directly responsible, [363] and to assist the local unions in negotiation, in handling grievances, and representation before Government agencies, and all similar sorts of representation.

Q. Are you influential in the establishment of policy in your union?

A. I would say that I am to some extent.

Q. Is it true that you are a paid employee or representatives of the I.L.W.U.?

A. I am certainly paid. Otherwise I'd miss a lot of meals.

(Testimony of Jack W. Hall.)

Q. Would you say that it constitutes a substantial source of your income?

A. It is my only source of income.

Q. Now, Mr. Hall, is the I.L.W.U. in favor of the elimination of agricultural exemption from the Fair Labor Standards Act?

A. It made such representation to Congress.

Q. It had?

The Court: May I have that over again?

(The reporter read the last question and answer.)

Q. Mr. Hall, is it not also the fact that the I.L.W.U. requested a 40-hour work week for all workers on the sugar plantations last year, including those whom you would now classify as agricultural?

A. That's correct. We believe 40 hours a week is [364] enough work for any individual.

Mr. Gladstein: May I ask Mr. Poole whether the question goes to a request of the union in collective bargaining negotiations or a request for legislation?

The Witness: Was a collective bargaining request.

By Mr. Poole:

Q. Well, now, is it not true that any restriction of the agricultural exemption by a decision of court would further the objectives of the union in achieving a 40-hour work week for plantation labor?

A. I don't think so.

(Testimony of Jack W. Hall.)

Mr. Gladstein: I object. Just a minute. I object to that, your Honor, upon the ground that it calls for speculation and is immaterial.

The Court: It strikes me that way, that the witness could give nothing more than his own view or possibly the—I can't quite see how that would be material.

Mr. Poole: I want the question to remain, your Honor, and I will take the objection, assuming that you have overruled it.

The Court: Well, let's have that question.

(The reporter read the last question and answer.)

The Court: All right. The answer is in.

A. Well, I'd like to expand upon it, if I have to answer the question. [365]

Q. You may proceed.

A. I don't think so, because we now have employees in the industry working on a 40-hour work week and receiving overtime after 40 hours.

Q. Well, is it not true that most of the employees during the grinding season do not receive time and a half after 40 hours?

A. That is true. But there are employees who do.

Q. What employees receive time and a half after 40 hours?

A. Warehouse employees in many situations, particularly mill warehouse employees.

Q. Do you know of your own knowledge how

(Testimony of Jack W. Hall.)

many employees receive time and a half after 40 hours? A. I do not.

Q. At Waialua? A. I do not.

Q. Is it not true, Mr. Hall, that you are a defendant in this case?

A. I understand I have been named as a defendant.

Q. Is it not true that most of the employees who are defendants in this case are members of the I.L.W.U.?

A. I don't know. I presume they are.

Q. You don't know as a fact?

A. I don't know all of them individually. [366]

Q. Well, would you say that many of them certainly are members?

A. I could say that I think safely.

Q. It is true, however, is it not, that the I.L.W.U. bargains for all such employees?

A. That is true.

Q. Now, is it not true that any employee who is held to be entitled to the overtime requirement of the Act because of the inapplicability of the agricultural exemption will benefit from it in terms of overtime compensation?

A. I believe that is so.

Q. Now, Mr. Hall, in view of the fact that many, if not all, of the employees, employee defendants, in this case are being represented by the I.L.W.U., as you have just stated, in view of the further fact that you are a paid employee and international rep-

(Testimony of Jack W. Hall.)

representative of such union, do you not admit that you are not in a position to testify impartially on the question of what constitutes agricultural labor?

A. I am in a position to testify impartially. I think my record in this community for impartiality in these situations is above reproach.

Q. You don't think that you are—you don't think that your loyalty and your allegiance to the I.L.W.U. and the principles for which it stands require you to testify as [367] you have?

A. Require me to tell the truth.

Q. Now, Mr. Hall, were you ever employed by the Waialua Agricultural Company?

A. No.

Q. How many times have you been on the plantation? A. At Waialua?

Q. Yes. A. I would say about ten times.

Q. Ten times? Let's take the most recent time that you were there. Can you fix the date of that?

A. Offhand I would think about three months ago.

Q. How long were you there three months ago?

A. Oh, several hours.

Q. How much time would you say you have spent on the plantation in your ten different visits?

A. Perhaps a total of 30 or 40 hours.

Q. I think you testified to the fact that you had not been through the mill.

A. I had not been through all the mill. I had been in the garage. I have been in the area where the cane goes into the mill, that is, the crushing

(Testimony of Jack W. Hall.)

plant. I have not been in the boiling house at that mill.

Q. Have you been in the fireroom?

A. I don't recall. I don't think so. [368]

Q. Have you been in the powerhouse?

A. No.

Q. Have you been in the machine shop?

A. I have been through most of the shops.

Q. Have you seen the cane loading machine in operation?

A. I think so but I don't recall all the detailed process in that particular mill.

Q. You are not sure that you have seen it?

A. Oh, I know I have seen cane going into the mill. I haven't crawled all over the plant.

The Court: Cane-loading machine, would that be an operation in the field?

Mr. Poole: That's a field operation.

The Witness: The cane carrier.

Q. Now, it is a fact that you have not seen the cane-loading machine which operates in the field?

A. I have had that operation described to me in detail by employees who are engaged in that operation.

Q. In other words, it was told but by someone else?

A. By employees engaged on that operation.

Q. I see. In other words, it is a fact, is it not, Mr. Hall, that you have not actually witnessed yourself the harvesting operations at the Waialua Plantation?

(Testimony of Jack W. Hall.)

A. That's a correct statement. I have witnessed harvesting operations throughout the industry and generally [369] the—

Q. Mr. Hall, please, you have stated that several times. It is in the record. And I'd like to have you confine yourself now just to the answers because we are going to get ahead much faster. Have you ever had an opportunity to view personally the manner in which the loaded cars come from the field over the portable tracks on to the main line and from thence to the mill?

A. At the Waialua Agricultural Company?

Q. Yes. A. Not at that plantation.

Q. Have you ever had an opportunity to study the irrigation system they have in effect at Waialua? A. No.

Q. Mr. Hall, from what you have said, it is true, is it not, that you do not have any detailed acquaintance with the operations at Waialua Agricultural Company?

A. At Waialua as such, no, but as I maintained throughout my testimony on direct examination the practices are similar on all plantations, and I am familiar with them at others.

Q. Mr. Hall, you have had a good deal to say regarding the operations of the plantations generally, sugar plantations generally in the Territory of Hawaii. Do you know how many plantations grind their own cane? [370]

A. All but Grove Farm, Gay and Robinson and the Waimea Sugar Mill Company on the Island of

(Testimony of Jack W. Hall.)

Kauai. Waimea Sugar Mill Company once had a mill that now grinds its cane at Kekaha Sugar Company. The Waianae Company, which is going out of business, I think, is grinding its cane at Ewa now rather than in its own mill. I can't testify to that positively. I haven't been out there for some months.

Q. Would you repeat that?

A. Waianae Company I think is grinding its cane at the Ewa mill. I can't testify to that positively because that Company has been in the process of going out of business. I haven't been out there for some months. All of the mills on the Island of Maui grind their own; all the plantations on the Island of Maui mill their own cane. All of the mills on the Island of Hawaii mill their own cane. As a matter of fact, Pepeekeo Plantation now has two mills with the consolidation of the Honomu Plantation and Pepeekeo Plantation into a single Company.

Q. I think the record states through the stipulation that there are some 34 plantations in the Territory of Hawaii. And how many did not grind their own cane?

A. Gay and Robinson.

Q. I mean the number.

A. Three. [371]

Q. Three?

A. And possibly Waianae, which would make four. I am not positive as to the situation there because it is in the process of liquidation.

Q. So you'd say that it is a fact that ordinarily most sugar plantations grind their own cane?

A. Well, of course, there are plantations that

(Testimony of Jack W. Hall.)

grind cane from adherent planters and from home-
tenders.

Q. I understand that but I say it is true that
most plantations ordinarily grind their own cane?

A. Grind any cane that is available to grind.

Q. Well, you are not answering my question.

A. They grind their own cane plus other cane.

Does that answer it?

Q. That is not my question. Isn't it true, Mr.
Hall, that most plantations ordinarily grind their
own cane?

A. If they have a mill, yes.

Q. Well, haven't you just stated that most of
them have a mill? A. That is correct.

Q. I don't understand your reluctance. It seems
to me it is obvious from what you said.

A. I don't understand what you are trying to
get at. The testimony is very clear.

Q. Are you at all familiar with the operations
that [372] have to do with the cutting of wood at
Waialua?

A. At Waialua specifically I have never seen
wood cut.

Q. You have never seen wood cut?

A. At Waialua.

Q. And you don't know for which purpose the
wood is used?

A. I know it is used for bathhouses because we
have been so informed. I understand we had some
discussions with the plantations about whether or
not they were going to supply it.

(Testimony of Jack W. Hall.)

Q. But your information is second-hand; you do not know of your own knowledge the purpose?

A. That is correct. I suppose it would be called second-hand but I rely on my informants.

Q. Mr. Hall, do you know the uses to which the irrigation water or water that comes down the ditches, to which there was some testimony, is used?

A. I understand some of the water is used for the locomotives. They use irrigation water because the well water is a little bit too brackish for locomotive boilers.

Q. Do you know that to be a fact of your own knowledge?

A. I have been told by engineers on the locomotives who put it in there. [373]

Q. Is it customary to clean a sugar house each week-end in the Territory of Hawaii?

A. Not the entire place, no.

Q. Well—

A. Some operations have to be performed every week-end.

Q. Well, is it a predominant practice in the Territory of Hawaii?

A. Only a small number of employees are usually engaged in performing week-end work.

Q. Mr. Hall, you are not responding to my question. What I am asking is this: Is it the practice by most of the plantations in the Territory of Hawaii to shut down their grinding operations and clean their mill?

(Testimony of Jack W. Hall.)

A. Grinding operations are shut down and mills are cleaned, that is correct.

Q. Each week-end?

A. The mills are shut down every week-end.

Q. For purposes of cleaning?

A. Also for the purpose of giving employees a day off as they are required to do under the contracts.

Q. Well, is it true that each week-end the different plantations do make repairs and clean the mill that is being used for sugar grinding in the making of raw sugar?

A. It is true that there is some work going on in [374] each mill insofar as I know on the week-end shut down, cleaning and hauling ashes, things of that kind.

Q. Well, now do you know of your own knowledge how many employees are working in connection with week-end repairs and cleaning in the mill at Waialua Agricultural Company?

A. I don't know the exact figure at Waialua.

Q. You do not? A. I do not.

Q. Well, would you say from your knowledge of the operation of sugar plantations here in the Territory of Hawaii that it is necessary to shut down the mill each week-end for purposes of repairing and cleaning it? A. I would say so.

Q. Are there any repairs made during the week?

A. Repairs that may be necessary in case of a breakdown.

Mr. Poole: Your witness.

(Testimony of Jack W. Hall.)

The Court: Aren't there continuing repairs of some sort day after day, week after week, as the necessity arises to repair various things?

The Witness: That's right, whenever anything breaks down that has to be overhauled. Lots of those repairs might go on while there is processing going on in the mill.

Redirect Examination

By Mr. Gladstein [375]

Q. Mr. Hall, you mentioned that the mills of the plantations of the sugar companies in the Territory besides grinding cane of their own grind cane of others. Would you explain?

A. Well, for example the Lihue Plantation Company grinds all of the cane for the Grove Farm Company.

Q. Do you know the arrangement there? I mean, does the Lihue Company buy the cane from the others or does it simply in substance and effect charge the Grove Farm Company for a service, namely, that of grinding sugar which is performed by the Lihue Company?

A. I can't testify to their financial arrangement.

Q. Go ahead.

A. The sugar grown by the Gay and Robinson Plantation is processed by the Olokele Sugar Company. And the sugar grown by the Waimea Sugar Mill Company is processed by the Kekaha Sugar Company. On the Island of Hawaii there are a large number of planters who either grow cane on leased land or in some cases on their own land. This

(Testimony of Jack W. Hall.)

cane is ground by the mills on that island. Olaa is one of the largest.

Q. Those planters that you have just testified about are the same as the adherent planters that you testified about earlier?

A. That is correct [376]

Q. Now, what is the arrangement that is used, the adherent planters sell their cane to the mill to be ground for them or what exactly happens?

A. The price they receive for their cane is fixed by, under the Sugar Act of 1937. They sign contracts with the individual growers but the minimum rates to be paid are fixed under the Sugar Act by determination.

Q. So in other words, those mills grind both the sugar cane which is grown on the land owned by the milling company and the cane that is purchased in effect from adherent planters, is that right?

A. That's right. It is purchased. The agreements read "Cane Purchase Agreement".

Mr. Gladstein: I have no other questions.

The Court: Well, I don't suppose it's material about what about the Pacific Sugar Mill?

The Witness: It is now part of Honokaa.

The Court: It's been absorbed?

The Witness: That's correct.

The Court: Puna Sugar Company?

The Witness: That's been absorbed by Olaa.

The Court: And Kukaiau?

The Witness: That is, I believe, is part of the Hamakua Mill now.

(Testimony of Jack W. Hall.)

The Court: The landowners don't continue to plant? [377]

The Witness: There are cane planters at Kohala, the planters association there; that cane is milled, I believe, by Honokaa.

The Court: Wailea?

The Witness: Wailea, that is also liquidated. I believe it is now part of Kohala.

Mr. Gladstein: One more question, Mr. Hall.

Redirect Examination

By Mr. Gladstein:

Q. Is any refining of sugar done by any of the members of H.S.P.A. in the Territory?

A. I don't know whether C. and H. is now a member of the H.S.P.A. Formerly the Honolulu Plantation Company, which was a member, refined sugar. That firm liquidated and was taken over by California and Hawaiian Sugar Refining Corporation. They are solely in the process of refining sugar at Aiea. The Maui Agricultural Company mill on the Island of Maui did do some refining. I don't know whether they are doing it this year.

Mr. Poole: Your Honor, I ask that the question and the answer be stricken. It is not relevant here at all.

The Court: I don't recall the question now.

(The reporter read the last question and answer.)

The Court: Well, is it the question that is objected to? [378]

Mr. Poole: I object to the question and I object

(Testimony of Jack W. Hall.)

to the answer. I see no relevance at all in relation to the issue that we have before us.

Mr. Gladstein: If I may state in defense of my question, your Honor, that it is a question which derives from my theory of this case which, as I said before is that these companies are in a business, part of which, an integral part of which is the refining of sugar. And that integral and very substantial aspect of their total operations colors and in turn integrates into the rest of their operations. And I think we have a right when we are talking about sugar processing exemption to show that it is a fact that any of the companies who are claiming this kind of an exemption are actually in a business which includes refining of sugar.

The Court: Well, I can't see where that is in any respect true except possibly as to those who are in the cooperative refinery, the California and Hawaiian Refinery. Their interest and operations may be, so far as to refining of sugar, but those who sell to other raw sugar producing mills or sell to refineries to which they have no attachment, I can't see where that——

Mr. Gladstein: I agree with your Honor. The point is that Mr. Hall's testimony is that the C. and H. Company, which is the company through which the Plaintiff in this [379] case and the other case and the other members of the H.S.P.A. get the greater portion of their raw sugar refined and put in a condition for marketing to the consumer,

(Testimony of Jack W. Hall.)

that very company, C. and H., is the one which has taken over a refinery here in the Territory it operates. That is as I understood Mr. Hall.

The Witness: That's correct.

Mr. Gladstein: So I think, your Honor, that under the circumstances the question can be answered or is clearly admissible for whatever weight the Court attaches to it.

The Court: All right. The motion is overruled.

Mr. Poole: What was your ruling?

The Court: Overruled.

Mr. Gladstein: I have no further questions.

Recross-Examination

By Mr. Poole:

Q. Mr. Hall, do you know whether or not there is a transfer of title by the plantations of their interest in the raw sugar when it goes to the refinery?

A. I do not.

Q. You do not? In fact, you know nothing about that subject matter, is that not correct?

A. I do not have that information here. I know our files are full of it.

Mr. Poole: That's all.

Mr. Gladstein: I have no further questions.

The Court: When was sugar unionized in Hawaii?

Mr. Poole: I can't hear your Honor.

The Court: I asked the witness when sugar was unionized in Hawaii. I asked and explained to the witness that that is outside of the case.

(Testimony of Jack W. Hall.)

The Witness: The first union was organized in 1938. We got our first contract at McBryde Sugar Company in 1941. But the industry as a whole was not completely organized until July, 1945.

The Court: All right.

(Witness excused.)

Mr. Gladstein: We rest, your Honor.

Mr. Poole: Your Honor, I want to renew the objection I made to Mr. Hall's testimony and rest it upon one further ground. In answer to the questions that I put to Mr. Hall on cross-examination, he stated very clearly that he had no personal knowledge of the things to which he had testified. Now, I would have had no objection to his testimony had it been purely of a factual nature. However, in his testimony he sought to attach a classification of either agricultural, transportation, or processing to each one of the employee defendants regarding whom he testified. As I told you yesterday, I think that that is highly improper. I think that none of that testimony should have been admitted. And today I make the point that his testimony is practically [381] all hearsay. Now, I understand that there is much of a general informative character about Mr. Hall's testimony, and no doubt your Honor feels that it will assist you in reaching a decision. But it seems to me in order to appropriately protect the interest of my client that I must have the objection, and I make it here again.

The Court: Well, your motion is to strike all of his evidence?

Mr. Poole: That's correct.

The Court: Upon the ground that it is incompetent?

Mr. Poole: Yes, and it is hearsay by his own admission.

The Court: The motion is denied.

Mr. Gladstein: There is one further thing I want to offer before resting, your Honor. I overlooked it. Perhaps we can stipulate to it. Certain portions of a document which is known as Sugar Manual, and which is a publication of the Hawaiian Sugar Planters Association, some of the material in it is clearly not relevant to these proceedings and wouldn't be material as evidence, and I wonder if it wouldn't be in the interest of saving time if during the recess Mr. Poole and I went through it and agreed on what portions we can introduce by way of a stipulation.

Mr. Poole: That is agreeable to me.

The Court: Well, you ask to reserve the right to offer [382] that, if there is any part of it that——

Mr. Gladstein: I do. That would be Defendants' Exhibit 2. And perhaps we ought to identify it for the record. It will consist of certain pages of a publication entitled "Sugar Manual" and published by the Hawaiian Sugar Planters Association.

The Court: Well, Mr. Clerk, you may put your identification on it.

The Clerk: That will be Defendants' Exhibit No. 2.

The Court: For identification.

The Clerk: For identification.

The Court: We have at the present time——

The Clerk: Defendants' Exhibit A for identification

Mr. Poole: Your Honor, could we take about a ten-minute recess now? I will then be prepared to go forward.

The Court: The Court will take a recess.

(A short recess was taken at 10:30 a.m.)

After Recess

Mr. Poole: Mr. Anderson, will you take the witness stand?

JOHN WILLIAM ANDERSON

a witness in behalf of the Plaintiff, being duly sworn, testified as follows: [383]

Direct Examination

By Mr. Poole:

Q. Mr. Anderson, will you state your full name? A. John William Anderson.

Q. And would you give your address?

A. Waialua, Oahu, T. H.

Q. What is your present position?

A. Assistant Manager of the Waialua Agricultural Company.

Q. How long have you held that position?

A. Since September, 1941.

Q. Could you state in a general way what your

(Testimony of John William Anderson.)

duties and functions are as Assistant Manager of the plantation?

A. My general duties are to assist the Manager in the development and administration of the Company policies and to coordinate the various departments on the plantation.

Q. Would you say that you were rather familiar with the over-all operations at the plantation?

A. Yes, I am.

Q. Mr. Anderson, it has been stated by a previous witness that on the week-end shutdown of the mill there was no sugar being made. Is that a correct statement?

A. Well, on occasions where we are blocked up in the boiling house, it is necessary to continue some of the boiling and drying operations. Every week-end there is [384] still some sugar in process, technically, in that low-grade mesquite in the crystalizers are in process; that is, the mesquite has the tiny grains of sugar and molasses, and these grains are growing while they are in the crystalizers, so that technically there is some sugar in process even during the week-end shutdown. Very occasionally the low-grade sugars are being dried in the crystalizers over the week-end, but that is not normal practice.

Q. What is the purpose of closing down the mill on the week-end in terms of ceasing to grind sugar cane?

A. Well, there are several reasons. The boiling

(Testimony of John William Anderson.)

house and the evaporators, the tubes, get a heavy scale on them and it is necessary to clean those tubes over the week-end. Otherwise the boiling of the juices is very inefficient with the heavy scale on the tubes. So it is necessary approximately every week-end to clean the tubes. In the crushing plant there are many usually minor repairs that have to be made. Occasionally they have to make major repairs such as changing the roller to improve the extraction and changing worn parts, such as the knives in the cane carrier, and perhaps some slats in the cane carriers, and repairs of that type.

Generally the repairs are not major but not infrequently we do have major repairs to make on the week-ends.

Q. Well, is it not so that you are closing down, then, [385] for purposes of repairing and cleaning the mill?

A. That is correct. It is also true that we are operating on a policy of one day of rest per week, so that field operations are shut down and to some extent the factory personnel have a day of rest. Some of those operating personnel are required for the maintenance work on the week-end.

Q. Well, are there reasons of sanitation why you close down and clean up?

A. There—I don't think that is a major factor. There would be some connection there. There are places where we have moving machinery where

(Testimony of John William Anderson.)

stuff piles up during the operating period and you have to shut the machinery down to clean it up.

Q. How many employees are working during the close-down of the mill on the week-end in this repair and clean-up work, approximately?

A. It varies from week to week depending on how many men you can get to turn out to do the necessary work. Usually we have a satisfactory turnout for that purpose. And it also depends on how much work has to be accomplished. I would say that out at Waialua we would probably run approximately sixty to a hundred men for the clean-up work over the week-end.

Q. Now, what percentage is that of your normal working [386] force in the mill when you are grinding?

A. Well, that would run from approximately 35 to 50 or 60 per cent.

Q. Is there some repair work done during the course of the week?

A. Yes. Sometimes it is necessary to shut the mill down to make the repairs. And sometimes repairs can be made without shutting.

Q. Are those repairs of the same general nature as the repairs that are made in the week-end while the mill is shut down?

A. If possible they put over the week-end, the repairs for the week-end, over to the week-end if it happens during the week. But they can't always

(Testimony of John William Anderson.)

do that. At times it is necessary to make repairs immediately.

Q. Were you here yesterday, Mr. Anderson?

A. Yes, I was.

Q. You heard the testimony of Mr. Hall?

A. Yes, I did.

Q. You recall that there was some question raised about the duties of Augustine Lorenzo. The stipulation——

The Court: Will you give us his number?

Mr. Poole: Forty-two in the complaint and forty-three in the stipulation.

Q. The stipulation states that he is a water supply [387] ditchman. And what I wanted to ask you was this: Is some of the water used for purposes other than irrigation with which he has to do in connection with his gauging activities or in connection with his duties which involve diverting water from one ditch to another?

A. Well, a very small portion of that water will eventually get into a storage tank which would be used to replenish the water supply of the locomotives.

Q. Approximately how much do you think he'd use in that each day?

A. It's a rather small amount. I would estimate it would run somewhere between ten and fifteen thousand gallons per day.

Q. You probably were not able to fix the per-

(Testimony of John William Anderson.)

centage of the water so used in relation to the total amount of water going through those ditches?

A. We use up to approximately a hundred million gallons per day for irrigation purposes.

The Court: You mean Lorenzo?

The Witness: The ditchmen.

The Court: But Lorenzo?

The Witness: No, he wouldn't handle that quantity of water. The water goes into a system handled by other ditchmen after it passes through his particular area of responsibility. [388]

Q. Let me ask you, to go back to the answer that you gave me in connection with the work of Mr. Lorenzo and the amount of water that passed through these ditches that ultimately found its way into this tank, which water is being used for locomotives, as I understand the answer to my question you stated that the entire amount of water used for locomotive purposes was the figure that you gave and it wasn't just the water coming from the particular ditch with which the duties of Mr. Lorenzo are connected? A. That's correct.

The Court: Does that mean that this tank, the reservoir, whatever it is that supplies the locomotives, that it is fed by water from various sources, some of which is let into it by this man Lorenzo and some by other employees in different places, water tenders?

Mr. Poole: Well, your Honor, the stipulation describes in some detail the rather elaborate irriga-

(Testimony of John William Anderson.)

tion system that they have on the plantation. And it also indicates in a general way the number of personnel that are used for that purpose. And I think that by reading the description of the irrigation system and tying that in to the description that you have here of the duties of Mr. Lorenzo, you get a fairly accurate picture of what his particular duties are in connection with the over-all irrigation system.

Mr. Gladstein: Wouldn't it be simpler for him to just [389] answer the question?

The Court: What I had in mind was this: Does Lorenzo operate the water supply that feeds this tank from which the locomotives are supplied? Does he exclusively do that or does the water come into the same tank from other sources?

The Witness: I might say that many tanks are used for the purpose of supplying the locomotives. It runs all along approximately two-thirds of the length of the plantation. And I am quite sure that he does not directly distribute the water from his own source directly into any one of the tanks but the water he handles passes to other ditchmen who release it into the storage tanks.

The Court: He is in charge of the main gate, one of the larger sources of supply?

The Witness: Yes, sir.

The Court: Go ahead.

Q. I wish to now direct your attention to Tadao Watanabe.

(Testimony of John William Anderson.)

Mr. Gladstein: What number?

Mr. Poole: It carries the number 44 in the complaint and 45 in the stipulation. The stipulation and complaint describe his duties as a rake operator. He operates a bulldozer rake for making fire breaks preparatory to the burning of cane and for opening track lines. I think there is also a statement to the effect that in rainy [390] weather he may haul cane.

Q. Now, what I'd like to have you explain is whether or not the hauling of cane is done regularly as a part of his duties or whether it is rare and infrequent?

A. I would say it was rare and infrequent.

Mr. Poole: Your Honor, I should like to make a comment here for the purpose of clarity. You will note that in reading the job descriptions set forth in the stipulation and also in the complaint that there are statements to the effect that in some work weeks particularly an employee will do one thing and in other work weeks he does other things or probably duties are added to his regular duties, and sometimes those duties are stated to be rare and infrequent and sometimes they are stated to be regular duties. Now, that description, that characterization of duties was set forth in that manner most deliberately because the Fair Labor Standards Act insofar as the work week is concerned, the payment of overtime, applies on a work-week basis. And it will be necessary for your Honor to deter-

(Testimony of John William Anderson.)

mine whether or not each of these particular activities or any of them come within the coverage of the Act and a particular exemption or any exemption. And it may well be that in your view an employee might be exempt from the Act one week and then in another week where his duties are different he might be covered. So it is important to note in that connection [391] that the stipulation shows that in some weeks the duties of the individual employees who are named as defendants vary.

Now, I have no further questions to ask, your Honor, but if it is the opinion of counsel for the Defendant or your Honor that any of the jobs of the defendants in this case are inadequately described, we have a witness here that we think is in a position to testify and answer such questions.

Mr. Gladstein: Are you through with your direct examination?

Mr. Poole: I am.

Mr. Gladstein: Does your Honor want to take a recess before proceeding or shall I proceed?

The Court: You may proceed.

Cross-Examination

By Mr. Gladstein:

Q. Mr. Anderson, not long ago your Company prepared a group of job descriptions setting forth the regular and ordinary and usual duties of its employees, isn't that right?

A. That's correct.

(Testimony of John William Anderson.)

Q. Did you participate in the making up of that job description? A. No, I did not.

Q. Are you familiar with it?

A. Yes, I am. [392]

Q. You have seen it put out? A. Yes.

Q. And you know who participated in making it up? A. Yes, I do.

Q. Who were the people in charge of that?

A. One of our assistants in the industrial relations department was the person who coordinated the program and who wrote up most of the language.

Q. Yes. And was it afterwards checked by responsible people in the Company to make certain that the final product would accurately state what the job description intended to do, namely, set forth the duties and work of the employees?

A. Yes, the supervisors did check it.

Q. Now, it was then put out in typewritten form, was it not? A. That's right.

Mr. Gladstein: I will ask the Clerk first to mark this as a Defendants' exhibit for identification.

The Clerk: Defendants' Exhibit B for identification.

Q. Mr. Anderson, I show you a compilation of typewritten pages bound together in a manila folder which has been marked "Defendants' Exhibit B for identification." Will you look at it and satisfy yourself as to whether it is a true copy of the job descriptions prepared by your Company and purporting to represent, job by job, an accurate [393]

(Testimony of John William Anderson.)

statement of the various duties and functions and work and tasks of the employees of the Company?

A. I might say that these descriptions appear to be the ones that we did develop out there. I would also like to say that from time to time we have made revisions, and whether all of the revisions are incorporated in here I am not in a position to say.

Q. Do you know whether any revision has been made with respect to the particular document that you are looking at now?

A. You mean the individual job?

Q. The entire compilation?

A. Well, that's what I am referring to. Some of the job descriptions, that is, each one of these pages represents a job description; some of the job descriptions have been revised from time to time; jobs have changed in some cases, or we found reason to change them due to a reassignment of duties.

Q. Do you recall the date when that particular document, Defendants' Exhibit B for identification, was prepared and put out in that form?

A. I believe it was approximately January of 1947 but I am not absolutely sure.

Q. And it would be the most up-to-date or latest, complete and comprehensive document of its kind for the [394] Company, would it not?

A. With the exception that we may have made some revisions which would be in our Company file of the same type of document.

Mr. Gladstein: I offer it in evidence, your Honor.

(Testimony of John William Anderson.)

The Court: That would be Exhibit 2?

The Clerk: Defendants' Exhibit 2.

(The document previously marked as "Defendants' Exhibit B for identification" was received in evidence as "Defendants' Exhibit No. 2.")

Mr. Poole: Would you state the purpose of this?

Mr. Gladstein: Supplementing the descriptions.

Mr. Poole: I have asked counsel the purpose for which he introduces it and he stated in answer that he is introducing it to supplement the descriptions of the duties of the named Defendants.

Mr. Gladstein: Yes, that's right.

Mr. Poole: However, as I examined the document—

Mr. Gladstein: I will take care of the point that you raise in just a moment.

Mr. Poole: —the individual Defendants are not identified with respect to the particular jobs.

Mr. Gladstein: Just what I am going to ask Mr. Anderson next.

Mr. Poole: All right. [395]

By Mr. Gladstein:

Q. Now, Mr. Anderson, Defendants' Exhibit No. 2 in evidence you will notice identifies the employees whose job descriptions are given here by number. What number or what do these numbers refer to, badge numbers or numbers by which the employees are carried on the payroll or what?

A. Those are the payroll numbers.

(Testimony of John William Anderson.)

Q. And you could by going, by comparing Defendants' Exhibit 2 with the complaint in this case and with your Company payroll, you could very easily, could you not, prepare a list that would indicate which of the pages in Defendants' Exhibit 2 applies to any particular Defendant in the case, isn't that true?

A. With the exception that some of the individuals have been transferred to other jobs. Those were the employees assigned to those jobs at the time the job descriptions were worked up.

Q. Well, what you are saying in effect is that since there might have been some transfers from one job to another, you would get a situation where a man who is a defendant in this case who is described as doing certain things and who would appear to be an employee having a certain number and whose duties would be set forth in a certain way in Defendants' Exhibit 2 would not correctly represent the situation today but you'd have some other employee doing that [396] job, wouldn't you?

A. That's correct.

Q. So that, in other words, you could make up such a list and on the list indicate if such be the case where a transfer had been made and the name of the new employee taking the place of the one formerly handling that job?

A. I believe so.

Q. Would you undertake to do that, please, before the conclusion of this case?

Mr. Poole: I don't know whether I can agree to that or not. It seems to me that what you are going

(Testimony of John William Anderson.)

to do here is end up with an entirely new list of defendants.

Mr. Gladstein: No.

Mr. Poole: Well, I can't see the purpose, if I might say so. You are asking him to supply other names.

Mr. Gladstein: No.

Mr. Poole: You are now filling the positions previously occupied by the Defendants where they have been transferred.

Mr. Gladstein: No, all I am suggesting is this, your Honor: I would like to have, and I think it would be easier if the witness did this in his own leisure and in possession of his payroll record to assist him, I would like to have him indicate which of the pages in Defendants' Exhibit 2 apply to the job descriptions that are set forth in the complaint. And I am not concerned about the name of the [397] employee but I am concerned about getting that into the record in order to have testimony to supplement the description of the jobs that are contained in the complaint. That's all.

Mr. Poole: Well, now, wouldn't this serve your purpose: At the time this suit was brought we named four employees whom we thought fairly represented each of the categories of work on the plantation. If Mr. Anderson were to take these job descriptions and identify each employee who is named as a Defendant with one of those job descriptions, that would satisfy you, would it not?

(Testimony of John William Anderson.)

Mr. Gladstein: Yes, except that he himself has mentioned that there had been some transfers.

Mr. Poole: Yes, but that's going to complicate your record, and the question is whether you are going to go on the adjudication of the old job or new job.

Mr. Gladstein: I don't think there is anything complicated about it.

The Court: Now you are raising the question in my mind about the complaint. It was filed when, or prepared when? I suppose it is to be found here. Yes, the complaint was filed April 9th.

Mr. Poole: April, 1947.

The Court: Then later, quite recently, you entered into a stipulation relating to these men on the jobs. That [398] was filed September 12, '47. Now, you've got here a classification of work which is said to have been made probably in January of this year and changed in some particulars from time to time. Now, the employment of these men as of today or at the time this stipulation was filed, September 12—or was it when the complaint was filed or was it when this schedule was made up?

Mr. Poole: The stipulation states itself that the facts as set forth in there where they related to the dates back, I think, before 1945 and subsequently, were presumed to continue down as of the time of the filing of the stipulation. I think that is substantially what the stipulation says. Now, necessarily, your Honor, in a situation like we have here those facts are going to be changing. But for pur-

(Testimony of John William Anderson.)

poses of this suit I don't think that it makes any substantial difference.

The Court: Well, perhaps not. It would be a presumption that the work would continue all the time unless there is something to show to the contrary.

Mr. Poole: Yes.

The Court: Well, now, every one of these men have a number? Every one has a badge or number?

The Witness: Yes.

The Court: And that would clearly identify him on your payroll and in the stipulation here and in the exhibit? [399]

The Witness: Yes.

Mr. Gladstein: I think that request I made of the witness would be the most convenient way of handling it. Otherwise, I would have to tortuously take him from paragraph to paragraph looking through this. Let me say one thing further. Even though there may have been a change in job on the part of one or two or a few others, it wouldn't matter because the suit is brought in a form wherein the Defendants are named in a representative capacity. Consequently, even if there were a situation where one or two jobs had been changed, it wouldn't affect the right of the Court to make an adjudication.

Mr. Poole: I'd like to have counsel restate his request. I am not certain that I understand it fully.

Mr. Gladstein: I am asking that the witness take his payroll or other document at the Company office

(Testimony of John William Anderson.)

that gives the employment numbers or badge numbers of the employees, that he take his copy—I am sure that you have one, don't you, Mr. Anderson, a copy of Defendants' Exhibit 2?

The Witness: Yes.

Mr. Gladstein: And that he take a copy of the complaint, and that he prepare from those three a table that will show which job description page in Defendants' Exhibit 2 applies to each and every of the Defendants whose duties are described in the complaint. Is that clear? [400]

Mr. Poole: Yes.

Mr. Gladstein: So that you can get them out lineally, so that we will simply have that reference.

Mr. Poole: And what are you requesting with respect to the particular employee who may have transferred from the job that is now described in the stipulation to some other job that is not described?

Mr. Gladstein: Well, I am not even concerned that that necessarily has to show.

Mr. Poole: If you would omit that, I would be inclined to go along with you fully.

Mr. Gladstein: All right. I don't see any purpose in having it in. So I will omit that from the request.

Mr. Poole: In other words, for purposes of this stipulation we can assume that each one of the em-

(Testimony of John William Anderson.)

ployees named in the suit is continuing in the job which he occupied at the time the stipulation was prepared.

Mr. Gladstein: That's satisfactory.

Mr. Poole: O.K.

Mr. Gladstein: What we want is an adjudication not for the individual but for the job.

The Court: I wanted to get that settled some way.

By Mr. Gladstein:

Q. Now, Mr. Anderson, when you do that, will you note that Defendants' Exhibit 2 has no page designation, [401] and it would be helpful—you see, for example, you might see that employee described in paragraph 45 of the complaint as employee No. 210 in Defendants' Exhibit 2. But I would then have to look through Defendants' Exhibit 2 to find 210. So perhaps you could take this copy as well and paginate it so that we can quickly get hold of the page. Would you do that?

A. To label it with the numbers corresponding to the numbers in the—

Q. It would be easier if you simply marked these one, two, three, four, five and so on and then refer in your chart that you are going to make up to the page number in Defendants' Exhibit 2 where a particular employee whose bango number, let's say, is 35, is doing a job that is described, let's say, in paragraph 50 of the complaint, just so that you can tie those all together. Would you do that?

(Testimony of John William Anderson.)

Mr. Gladstein: May we have permission for the witness to take that exhibit for that purpose?

The Court: Yes.

Mr. Poole: May I ask counsel where he obtained a copy of this? How do you know that that is an accurate copy?

Mr. Gladstein: My understanding is that the Company distributed these and I obtained this copy from Mr. Hall of the I.L.W.U. And I understand that the purpose, the original purpose for which these were prepared was in [402] connection with the job reclassification that were taking place as a result of collective bargaining between the union and the Companies. Isn't that a correct statement, Mr. Poole?

Mr. Poole: You offer this document in evidence now?

The Clerk: It's Defendants' Exhibit No. 2.

Mr. Poole: Your Honor, I want to reserve the right to go over it and determine whether or not it is in fact the particular document for which it was offered.

Mr. Gladstein: The witness has already identified it.

Mr. Poole: I don't think the witness can identify it. It is a document with 150 or 200 pages.

The Witness: I did point out, however, that some descriptions may have changed.

The Court: Well, now, if that doesn't interfere with his taking it, if he can show us that this is not a true copy or complete copy or anything of

(Testimony of John William Anderson.)

that sort, why we will take care of the matter then.

Mr. Gladstein: That is entirely satisfactory.

Mr. Poole: I take it, your Honor, that this proceeding is going over until Monday anyway.

The Court: It will apparently have to, yes.

Mr. Poole: And that being so, over the week-end I think we will have an opportunity to examine the document carefully.

The Court: Yes. [403]

Mr. Gladstein: You can make that chart up over the week-end.

Mr. Poole: I think we can.

By Mr. Gladstein:

Q. Mr. Anderson, how many employees work on this week-end sugar that you were testifying about? A. Week-end sugar?

Q. Yes, you called it what? A. Mesquite.

Q. Yes.

A. Well, unless the sugar is being dried, there are essentially no workers working on the sugar. I pointed out that at times it is necessary to dry sugar during the week-end.

Q. That would be rare and infrequent?

A. Yes.

Q. And generally and in connection with this week-end sugar, let's use that expression, if you understand me, none of the operations and activities which usually and normally take place in connection with the processing of sugar are taking place during the week-end shutdown, isn't that true?

(Testimony of John William Anderson.)

A. That is true. The process in the crystal-lizers goes on throughout the week, including the week-end.

Q. Now, what ratio does this small portion—I think [404] you described it as a small portion—of sugar that is still in the machines—isn't that right?—during the week-end?

A. Well, it is not a small portion. It is a low grade sugar.

Q. Low grade sugar? What ratio does it bear to the average weekly output of sugar in the mill?

The Court: Now, you mean this that is dealt with by employees?

Mr. Gladstein: Yes.

The Court: The witness spoke about a processing that goes on, natural processing that goes on. I don't want him confused between natural processing, chemical reaction and crystallization, and so forth, with the men employed in drying out the sugar.

The Witness: In other words, this sugar is not—this mesquite when it is put through the centrifugals is not sugar that goes into commerce. It is used as syrup for the high-grade, what we call high-grade sugar, which is the raw sugar that goes to the market.

Q. So that in no sense is this week-end sugar any portion of the normal routine sugar processing operations and output of the mill, isn't that correct?

A. I don't believe that is correct.

Q. What is incorrect about it?

(Testimony of John William Anderson.)

A. Well, we do process the low grade sugar throughout [405] the week. It is used for the making up of the high-grade sugar. We are trying to recover sugar from the molasses.

Mr. Poole: Your Honor, that is described fully in the stipulation.

By Mr. Gladstein:

Q. Now, what percentage or ratio does that low-grade sugar bear to the total output?

A. Well, I don't know that you could put it in terms of percentage because it is a different—it is not the same product that is marketed.

Q. All right.

A. I might say that I think normally the sugar is held approximately two weeks in these crystal-lizers. Some is being drawn off all the time while we are making the high-grade sugars.

Q. Now, you use a grab in your fields, don't you, to load the cane into cars, is that right?

A. Yes.

Q. Now, that machine is used for two purposes, isn't it?

A. It is used for loading the cane into the cars.

Q. All right.

A. Grabbing it from the ground and loading it into the cars.

Q. That's right. And in doing that it partially [406] harvests and partially loads, isn't that right?

Mr. Poole: I object, your Honor, because there's been nothing here to establish the proposition that harvesting is just grabbing. In fact, the position

(Testimony of John William Anderson.)

that I take, and as I will show in my oral argument, harvesting is not only the cutting or the picking of the horticultural and agricultural commodity but it means the ingathering of it, placing it in storage, and I object to the form of the question.

Mr. Gladstein: I will take a ruling on it.

The Court: I think that it should be permitted. You are going to argue that and to show just what you conceive to be the operation of harvesting, but the details that are involved, there may be a contest about that, and I think it is proper for the Court to know all the details of the operation.

Mr. Poole: Well, I don't object to you knowing all the details of the operation, but I do object to the use of the term harvesting as being just descriptive of the picking up of the standing cane. He is using it in that sense.

The Court: Well, that would be harvesting so far as that operation goes.

Mr. Poole: And he says as opposed to loading that he implies it is not harvesting.

Mr. Gladstein: Well, I'll change the question.

Q. Mr. Anderson, that machine is used among other purposes for the purpose of clearing a pathway or roadbed upon which the portable tracks may be laid, that is true, isn't it?

A. Only very occasionally. Normally that job is done by the rake.

Q. All right. And in connection with the use of that grab, they are men who are cutting the cane, too, isn't that true?

(Testimony of John William Anderson.)

A. They are trimming the stubble.

Q. That grab will pull cane out of the ground and then dump the cane in little piles, wouldn't it, isn't that the operation?

A. That's true to some extent, although the same machine puts the cane on to the cars.

Q. Well, sometimes it is that way and sometimes the machine comes back to the piles, grabs the piles and loads the pile into a railroad car or truck, isn't that correct?

A. They may do that.

The Court: This is outside of the point but I wish someone would tell me if you grab the cane out of the ground by the roots what becomes of the ratoon prospect?

Mr. Poole: That is fully described in the stipulation.

The Court: It is?

Mr. Poole: Showing how it is necessary to realine [408] the cane stubble after this harvesting process.

The Court: Oh, after this.

Mr. Poole: I am perfectly willing to have this witness go ahead.

The Court: Well, that will be all right. I was just wondering about that. Go ahead.

Mr. Poole: Are you through?

Mr. Gladstein: That's all I have.

Redirect Examination

By Mr. Poole:

Q. Mr. Anderson, I would like to ask you a few questions with respect to the harvesting operation

(Testimony of John William Anderson.)

I think that there has been some misunderstanding as a result of statements that have been made both by Mr. Hall and yourself as to the so-called piling of cane. Now, first, isn't it true that the greater portion of the cane is picked up by grab while the cane is in a standing position and loaded directly on or into the cane car? A. That's correct.

Q. And it is also true that they bulldoze cane by rake to form a lane upon which the portable track is placed and that that cane is bulldozed out from under electric lines and out of the corners as piled, and that those piles in turn are picked up by the grab and crane and placed in cane cars?

A. That's correct. Even under those piles made by [409] the rake on the grab that handles that pile, he still has to sever the cane that is under the pile and sever that from the ground.

Q. I am not quite sure I quite follow you there. If the cane has been bulldozed, isn't it loose from the ground?

A. That portion which has been bulldozed is loose. But he deposits his rake load of cane on top of some cane that has not been severed.

Q. I see. So at all times he is also picking up cane that has not been severed from the ground?

A. That's right.

Q. And placing that cane, as well as other cane that may have been bulldozed there in the making of these lanes for the portable track and in out of the way corners into the cane cars?

A. That's right.

(Testimony of John William Anderson.)

Recross-Examination

By Mr. Gladstein:

Q. The grabs and piling rakes are used, then, for piling of cane, is that right?

A. Well, the primary function of the rake is to clear the lane.

Q. Well, they use it for piling, don't they?

A. Only occasionally. That is not the normal practice. On other plantations it is, but not at Waialua. [410]

Q. Is any hand-piling done?

A. Not any longer.

Q. Used to?

A. Several years ago, about 1938, we were still hand-piling to some extent.

Q. And there's still hand-piling in the industry here, isn't there, to some extent?

A. I haven't seen any in the last couple of years that I can recall.

Q. The advance of civilization.

Mr. Gladstein: I have no further questions.

Mr. Poole: I should like to ask one further question on piling.

By Mr. Poole:

Q. Such piling as is done, is it in the nature of so-called windrow?

A. It is not a windrow. What happens is between two tracks, for instance.

Q. Between two portable tracks?

A. Take the area between two portable tracks,

(Testimony of John William Anderson.)

the first thing that we do is to put a loading crane in the middle to throw the cane to either side from that middle strip.

Q. Yes?

A. Because the boom cannot reach from the middle to [411] the track. And then that same machine will normally come back alongside of the track and complete the grabbing of the cane adjacent to the track and loading the cane that it had previously grabbed in that first swipe through the middle of the track there, load that all on to the cane cars.

Q. In other words, there is no huge pile of cane as a result of any rake or bulldozing operation?

A. That is not the practice out at our place. We do pass the cane from the machine going down the center. He casts half his pile one way and half the other way normally and then he comes alongside of the track and loads all of the cane there on to the track. And he'd have to go over to the next track and do the same process over there.

Mr. Gladstein: I do have another question.

By Mr. Gladstein:

Q. Mr. Anderson, your Company is associated or connected with one of the factors in Hawaii, is it not?

A. That's correct.

Q. And that factor is which one?

A. Castle and Cooke, Limited.

Q. And your Company as such and Castle and Cooke as such are both members of the H.S.P.A., are they not?

(Testimony of John William Anderson.)

Mr. Poole: I object to this line of examination, your Honor. I don't see the purpose of it. If this were [412] a different type of proceeding involving such issues it might be relevant, but I certainly don't see it here.

The Court: What is the purpose of connecting the Plaintiff up with the H.S.P.A.?

Mr. Gladstein: It is for the purpose, your Honor, of showing that the sugar industry in Hawaii is a very highly integrated one as a manufacturing industry which winds up in the refining of sugar at Crockett, San Francisco, mainly Crockett, where it is done by a Company that is wholly-owned and controlled by the Plaintiff in this case and the other members of the H.S.P.A. Now, I therefore feel that this evidence is valid and material in support of my theory. Your Honor must bear in mind that when you are going to be applying this law, you will be considering the legislative history of the Act and you will be considering the problems that are raised in the light of what Congress said as to whom it had in mind when it was going to exempt people from the applicability of this law. And it is my contention that this very unique industry is not the kind of farming operation and not the kind of sugar processor that Congress had in mind when it was giving exemption, and that we ought to have these facts in the record so that the true character of the industry may appear in it.

Mr. Poole: But I again voice my objection. From the very beginning Mr. Gladstein has sought

(Testimony of John William Anderson.)

to conduct this law [413] suit on the basis that each member of the sugar industry was before the Court as a party. And he is doing the same here. And he is seeking to get in what in his judgment is prejudicial evidence. I don't think that it is, but I think that it is irrelevant and that we are continuing to clutter the record here with a lot of matters that don't advance this cause any at all.

Mr. Gladstein: Well, I will confine my questions to the Waialua Company, if that's the point of the objection, and I will withdraw the last question and rephrase it, and I will ask the witness whether it isn't a fact that the Company, Waialua Company, is a member of the H.S.P.A. That's true, isn't it?

Mr. Poole: I object to the question.

The Court: Overruled.

Mr. Gladstein: Will you answer, please?

A. As far as I know, the Company is a member.

Q. And it is also true, isn't it, Mr. Anderson, that the Waialua Company, together with other plantations in the Territory who are also members of the H.S.P.A., operate the C. and H. Refinery at Crockett, California, isn't that true?

A. I don't know that absolutely, although that is my understanding.

Mr. Poole: Your Honor, I object and ask that the [414] question and the answer be stricken.

The Court: It may be stricken.

Mr. Gladstein: I think that's all.

By Mr. Poole:

Q. Mr. Anderson, I want to direct your atten-

(Testimony of John William Anderson.)

tion to the job analysis that you stated the Plaintiff in this case assisted in working up. Would you tell me what the purpose of this particular analysis was?

A. The purpose of that particular project was to assist in matching the jobs, the various personnel were doing, with the job classification manual which was agreed to in the negotiations last fall. The job classification manual defines different jobs and assigns job, job titles and labor grades, and we developed those job descriptions to assist in matching the jobs, the jobs the employees were actually doing against the job definitions in the classification manual.

Q. Yes, but what was the ultimate purpose? Was the ultimate purpose to make more uniform the compensation that was being paid employees for similar work?

Mr. Gladstein: I think that's immaterial. I object to it. The only question involved here is whether that job analysis is an accurate statement of the facts which it purports to set forth and not whether it was for the purpose of making wage rates more uniform or less uniform. [415]

Mr. Poole: No, I think your Honor, that this is a most relevant question because it determines the light in which this particular analysis was made, prepared. And as such, it will color the document and indicate the particular facts that are being emphasized.

The Court: Well, as I get it, the union and the

(Testimony of John William Anderson.)

Company in negotiations, the union presented a job classification of its own, did it not?

The Witness: The industry did.

The Court: Or the industry did. And that classification entered into your negotiations with the union?

The Witness: That's correct, as part of the contract.

The Court: Now, you say this was set up to make it more definite or detailed or what?

The Witness: To enable us to more accurately place the man on the job that he was supposed to do in accordance with the manual. For instance, in the new manual the job title may have been one particular title, and in our previous practice perhaps he was called something else. Now, in order to determine the proper assignment of the job title to the man, it was necessary to describe the jobs to insure we are doing it correctly.

The Court: So that the Company prepared this and then made the employees familiar with this, did they?

The Witness: That's correct. And we matched up the [416] job description with the job definition in the classification manual.

The Court: Well, isn't that all there is to it?

Mr. Poole: I think that he has given the answer. I think he has fully stated the purpose of the analysis.

The Court: Well, I believe that I understand it.

(Testimony of John William Anderson.)

By Mr. Poole:

Q. Mr. Anderson, would you say that as of to-day, in its amended form—and I think you did indicate that there were some amendments—it accurately reflects what the employees are doing?

A. There are undoubtedly further amendments that perhaps are required even as of this moment. I think a set of job descriptions on a Company of our size would have to be continually revised as the jobs are changed. I mean, it is a never-ending job.

Q. In other words, from time to time the particular duties that are given the employee change irrespective of the way his job is set up?

A. That's correct. We get new machinery, for instance, or we eliminate jobs for various reasons, so that those jobs, those job descriptions have to be revised continually.

Mr. Poole: No further questions.

Mr. Gladstein: No questions.

(Witness excused.) [417]

The Court: Do you have any other witness?

Mr. Poole: No, no further witnesses.

The Court: And you are ready to rest now?

Mr. Poole: Yes, the Plaintiff rests.

The Court: And the next thing, then, will be the argument. Now, you asked for a chart, a coordination of these particular—

Mr. Poole: I shall try and have a chart ready for the Court Monday morning at nine o'clock.

The Court: Well, we may just as well adjourn

the case, then, until Monday morning at nine o'clock.

Mr. Poole: Well, that's what I am suggesting, your Honor.

The Court: Following any preliminaries of whatever time may be required in connection with the outstanding matter, you will be ready for argument then at that time?

Mr. Poole: That is all right.

Mr. Gladstein: Yes.

The Court: All right. This case is adjourned until Monday morning next at nine o'clock.

(The Court adjourned at 11:55 o'clock, a.m.)

Honolulu, T. H., September 22, 1947

The Clerk: Civil No. 787, Waialua Agricultural Company versus Ciraco Meneja and others, for further trial.

Mr. Poole: Ready.

Mr. Gladstein: Ready. This is a continued examination of Mr. Anderson who over the week-end was supposed to prepare a chart.

JOHN WILLIAM ANDERSON,
a witness in behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

Recross-Examination
(Continued)

By Mr. Gladstein:

Q. Mr. Anderson, did you make such a chart?

A. Yes, I did.

(Testimony of John William Anderson.)

The Clerk: Defendants' Exhibit C for identification.

Q. Mr. Anderson, I show you a two-page document which has been marked "Defendants' Exhibit C for identification." Is that the chart which you prepared over the week-end? A. It is.

Q. Will you explain the contents of that chart and how you prepared it, from what sources and what the chart represents? [419]

A. The chart shows the number in the stipulation, that is, in the stipulation we have numbers preceding each person whose job is described. We also have the name of the person in the stipulation.

Q. When you refer to the stipulation, you mean the stipulation that is on file in this case?

A. Yes. We have the job title in the stipulation. We also have the job title in the Waialua Agricultural Company job descriptions, which is in that exhibit which you hold.

Q. When you are referring to the exhibit which I hold you are referring to Defendants' Exhibit No. 2 in evidence?

A. That's correct. We have tabbed in that same exhibit the number corresponding to the number in the stipulation, that is, the job in the Waialua job descriptions matching the job pertaining to the named defendant in the stipulation.

Q. Let's see if we can illustrate that. For example, the first worker who was referred to in the stipulation on file in this case bears number 39, and his name is—what is his name there?

(Testimony of John William Anderson.)

A. Ciraco Maneja.

Q. Maneja. By the way, that employee and his duties, while bearing the number 39 in the stipulation, bear the [420] number 38 in the complaint on file, isn't that right?

A. I believe so. There's a difference of one.

Q. And in each instance the number used in the stipulation is one higher than the number used in the complaint, and you have used the number in the stipulation, is that right?

A. That's correct.

Q. Now, would you illustrate, take employee 39, Maneja, and indicate to us how you went about determining which page or pages in Defendants' Exhibit 2 in evidence should be referred to in Defendants' C for identification?

A. Our industrial relations department took this document on Saturday and inasmuch as they were present at the time the jobs in our job description manual were matched against the H.S.P.A. classification manual, they read over the descriptions in the stipulation and picked out the job in the job description manual.

Q. And in some instance it is true, is it not, Mr. Anderson, that the duties performed by an employee who is named and described in the stipulation would require the tabbing of three or four pages in Defendants' Exhibit 2 in evidence in order to get a complete statement of his duties, isn't that right?

A. Yes, that's correct.

(Testimony of John William Anderson.)

Mr. Poole: Would you have Mr. Anderson describe the [421] particular employee defendant's work that required a reference to more than one job?

Mr. Gladstein: Would you do that?

Mr. Poole: Otherwise it might be confusing to the Court.

A. Well, for instance, number 54, Pedro Dum-lao, he is labeled as a cane carrier in the stipulation. We have him covered under 54 here in four different jobs. We have him as a mill aid, uncouple man; mill aid, uncoupleup man; mill aid, wash carrier man; and mill aid, rock watchman. Those jobs are all together. They are listed on this summary. They are all together in the job description.

The Court: Rock what?

The Witness: Rock watchman.

Q. The summary you have just referred to is Defendants' C for identification?

A. That's correct.

Q. Do you have other instances with more than one page in Defendants' C for identification that had to be used to indicate the jobs of an employee involved in this case?

A. That's the only instance.

Q. In other cases one page sufficed?

A. Well, it may run over one page but each page shows the job title corresponding to the job title listed [422] here.

Q. So that by reference to the chart, Defend-

(Testimony of John William Anderson.)

ants' C for identification, an exact determination can be made as to how many pages of Defendants' 2 in evidence are required to indicate the job of the employee that you are concerned with, is that right?

A. I don't believe you can tell how many pages—what I mean to say is that this particular page here, for instance, is a job title listed here as mill aid, uncouple man, and——

The Court: Does that mean uncouple the cars that come in?

The Witness: That's correct.

The Court: And other times he couples them up again?

The Witness: That's correct. The duties of the mill aid, couple-up man are listed separately upon this separate sheet. Now, there are, I believe, a few cases where the job description of a particular job may run over the one page, but it's easily identified here by the fact that each job is listed by title.

Q. One more question on this. This is a fact, is it not, Mr. Anderson, that Defendants' 2 in evidence contains job descriptions for jobs that are different from and outside of the scope of jobs set forth in the stipulation?

A. That's correct. For instance, in some of the testimony it was indicated that an individual may on [423] occasions cut firewood as an occasional duty. We have not covered that in our job descriptions of the particular tractor driver who may be

(Testimony of John William Anderson.)

concerned because that is not the duty for which he is——

Q. Primarily hired?

A. ——primarily hired.

Q. I had also in mind that the stipulation sets forth the duties of a certain given number of jobs, approximately 45 or 47, and it is a fact that Defendants' Exhibit 2 in evidence sets forth the duties of many more than that number, isn't that true?

A. That's correct. We have in this document here, which is Exhibit No. 2, all of the jobs on the plantation which we have described. And I would say that probably somewhere around two hundred jobs or so in this manual here, whereas in the stipulation they list some forty odd.

Mr. Poole: Forty-seven.

The Court: Did I understand you to say that even then that doesn't define the wood cutting or gathering?

The Witness: I don't—I am reasonably sure that we do not have the duties of a firewood chopper listed in here because we did not have anyone assigned to that job normally. It is just more or less an off season.

The Court: Incidental?

The Witness: That's correct. [424]

Mr. Gladstein: I will offer Defendants' C for identification in evidence, your Honor.

The Court: That's Exhibit 3?

(Testimony of John William Anderson.)

The Clerk: Yes, your Honor, C for identification is now 3 in evidence.

The Court: By way of description, that's a job classification schedule?

Mr. Gladstein: It's a two-page chart or table.

The Witness: Chart.

Mr. Gladstein: It is a comparative table consisting of two pages. Wouldn't that be the way to describe it?

The Witness: Yes.

(The document previously marked "Defendants' Exhibit C for identification" was received in evidence as "Defendants' Exhibit No. 3.")

Q. Now, Mr. Anderson, would you take Defendants' 3 in evidence and go through it, naming, as you do, those employees who at present receive overtime pay at one and one-half times the regular rate for hours in excess of 40 during any particular work week, indicating particularly whether the employee in that who does receive overtime gets it during the grinding season or during the off season alone or at what particular periods this happens?

Mr. Poole: I think I am going to take an objection to that question, your Honor. I'd like to hear Mr. Gladstein [425] indicate just what he thinks is relevant and pertinent to in the issue we have in this case, as to whether or not a particular employee may be paid overtime and under what conditions at the present time.

(Testimony of John William Anderson.)

Mr. Gladstein: Yes, I will be very happy to do that. In the stipulation that is on file, your Honor, on page 6-a there is a statement of fact with respect to the overtime compensation that is paid to employees of this Company after 40 hours a week. Part of that statement is to this effect, that since October 4, 1943, employees in the mill and in the allied service shops have been paid time and one-half during the off season for all hours worked in excess of 40 per week. Now, I submit that that, although it is a statement of fact, is somewhat general, and since, as I understand it, Defendants' 3 in evidence refers to employees in part at least who are in the mill or who are in allied service shops, it would be important and material to have this witness indicate which of those employees fall within the statement of fact that is contained on page 6-a of the stipulation. And also which, if any, of the employees receive overtime beyond the off season, if any did. In other words, by the very fact that we have this statement in the stipulation, both parties in effect concede that it is a fact, a statement of fact, which is material in the case, and it is now evidence in this case. But I submit that left [426] in this state it is a little vague and general and that we ought to button this up with specific testimony from the witness taken from this chart.

Mr. Poole: Your Honor, I made this objection primarily to highlight what I think may be involved

(Testimony of John William Anderson.)

in the argument that is going to follow from the evidence given by Mr. Anderson. As I view this case, we have a declaratory judgment action here to determine whether or not specifically named employees are subject to the overtime provisions of the Act. There is a controversy on it between the particular employees in the legal sense and the Plaintiff as to whether or not the overtime provisions apply. Now, it makes no difference as to what employees may be paid overtime at the present time. So as I view it, it is completely irrelevant as to what the existing practice is. And I think that the witness should not be allowed to go into these ramifications. It is true, as Mr. Gladstein has pointed out, the stipulation did in a general way indicate where overtime is paid, and under what circumstances. Why it was being paid, the stipulation does not explain. And I think that it is completely irrelevant here to go into the question as to whether or not any of these defendant employees are presently receiving overtime. And it would mislead your Honor if that was the basis of your ultimate determination. I want to make that point at the present time. [427]

Mr. Gladstein: I think there is one more reason for the admissibility of this evidence, your Honor. and that is, we are asking in our answer in the cross-complaint for an accounting, if the judgment is in favor of any of our employees, and therefore the evidence would be material on that score to in-

(Testimony of John William Anderson.)

dicates which employees already are receiving overtime and therefore aren't entitled to any.

Mr. Poole: But your Honor, I admit that when we come to try the provisions of the claims made by the Defendants in this case, that it is material. There is no question about that. Should you hold and be sustained in finding that some of the employees who are not now receiving overtime should have received it in the past.

The Court: Point out to me where in the stipulation the language is used that you say?

Mr. Gladstein: Page 6-a, paragraph 3.

The Court: Oh, 6-a.

Mr. Gladstein: Of the stipulation, paragraph 3.

The Court: Objection overruled.

Mr. Gladstein: Will you answer the question, Mr. Anderson?

A. At the present time we are paying overtime the year round for hours in excess of 40 to Yack Chun Lee, No. 83 in the stipulation. Then in the—if I may see the stipulation I'd like to determine whether or not the stipulation [428] refers to moving of cars of sugar to the O. R. & L. track in No. 51.

Q. No. 51?

A. It refers that to—in other work weeks he is engaged exclusively in hauling freight cars to the—"In other work weeks he is engaged exclusively in hauling rail cars loaded with plantation freight from the O. R. & L. spur to plantation yard

(Testimony of John William Anderson.)

and warehouses, and in removing rail cars loaded with sugar and molasses from the sugar and molasses loading stations of the plantation to O. R. & L. siding." Then that would apply to No. 51 in the stipulation.

Q. That is, he receives overtime after 40 hours per week throughout the year?

A. When he is doing that type of activity. There are some others, now, who receive overtime for hours in excess of 40 during the off season. I will try to identify those. No. 54—I'd like to say in this connection that although I will identify these persons who normally would get the overtime in the off season for hours in excess of 40, they may not be assigned to duties in the repair of the mill on certain occasions. I would say normally these persons would be engaged in such activity but occasionally they may be assigned to duties away from the mill, and in those cases they would not be eligible for overtime: No. 55, No. 57, 58, 59, 60, 61, 62, 63, 64, 65. I'd like to mention that [429] in the so-called allied shops that, although most of the machine shop and welding shop employees are used in the mill repairs in the off season and therefore eligible for overtime for hours in excess of 40 in those work weeks, that occasionally they are assigned other work having no connection with the machine shop, and if their activities for the week are exclusively on non-mill repairs they would not be paid the overtime for the hours in excess of 40.

(Testimony of John William Anderson.)

Therefore employees 65, 67 would come under that category.

Now, here are some others who have occasionally, very occasionally may perform some work in connection with the mill repairs: Employees 68, 69, 76, 77, 78, 86, and normally—add 75 to that also—employee 80 normally works in the warehouse in the off season. I think it is so indicated in the stipulation, and therefore he would be paid for overtime for hours in excess of 40. I believe that covers it.

Q. That covers the list? A. Yes.

Q. The last group of numbers, about a half dozen of them that you said occasionally work in mill repair, when they do so they receive overtime after 40 hours? A. That's correct.

Mr. Poole: Did he say that or did he say that they received overtime during the dead season or off season?

The Witness: No, they receive overtime for the work, [430] I mean for hours in excess of 40 for the work weeks in which they do work in connection with the factory repairs.

Mr. Poole: During the grinding season?

The Witness: During the off season.

Mr. Poole: Just during the off season?

The Witness: Just during the off season.

Mr. Poole: I don't think you made that clear.

The Witness: Well, perhaps I didn't make myself clear and I will attempt to do so. We are no

(Testimony of John William Anderson.)

paying overtime for hours in excess of 40 to any of the employees in the factory and the allied shops during the grinding season.

By Mr. Gladstein:

Q. In other words, there are only two, I think, of the employees on that chart, Defendants' 3 in evidence, who do receive overtime for hours after 40 each week throughout the year regardless of whether the season is grinding or off season?

A. The only two that I recognize, that is, No. 51 and 83——

Q. There are others but they don't appear on the chart?

A. That's correct, there are other employees in the warehouse, for instance.

The Court: Eighty-three you said, 51 and 83?

The Witness: Yes, sir. I might point out also that in [431] connection with employee No. 51, I think I have mentioned it before but I'd like to point out again that he is eligible for overtime for hours in excess of 40 only in those work weeks in which he is handling the freight from the O. R. and L. tracks to and from our warehouse.

Q. That is, when he is working as a locomotive driver?

A. No, he is a locomotive driver most of the year, but he is only handling the freight from the O. R. and L. tracks, to and from the O. R. & L. tracks on certain work weeks, and he is eligible for that overtime only on those work weeks.

(Testimony of John William Anderson.)

Mr. Gladstein: That's all the questions that I have, Mr. Anderson.

Mr. Poole: I just want to summarize what I think you stated.

By Mr. Poole:

Q. Now, with respect to the employees who work in the mill or who do any repair work in connection with the mill, there is no overtime paid except during the off season?

A. That's correct.

Q. But during the off season you pay time and a half for all hours in excess of 40?

A. That's correct.

Q. To those particular employees? Now, except for certain isolated instances which are referred to in the [432] stipulation, you do not pay any overtime compensation to any other employees working on the plantation whose duties are not directly connected with the operation of the mill or the maintenance and repair of the mill, and those isolated instances are certain employees working in warehousing and employees working in the central office, is that statement correct?

A. And I don't believe you covered the locomotive.

Q. The locomotive engineer who upon occasion in certain work weeks will haul supplies from the O. R. and L. to the warehouse in the plantation and other work weeks will haul sugar and molasses from the mill to the O. R. and L.?

Testimony of John William Anderson.)

A. That's correct.

Q. That's correct?

A. I'd like to clarify your first statement a little. You mentioned no overtime. That should be qualified to the extent that we do not pay overtime for hours in excess of 40. But we do pay overtime for hours in excess of 48 in all cases.

Q. In other words, under the Territorial Law of Hawaii, you are required to pay time and one-half for all hours in excess of 48 irrespective of whether the employee may be agricultural or industrial or in what he is engaged?

A. I believe that that is the case. But in any event it is a contractual obligation also. [433]

Mr. Poole: I see. No further questions.

By Mr. Gladstein:

Q. Generally speaking, how many workers in the warehouse throughout the year over-all receive overtime for hours in excess of 40 per week, approximately? A. I believe about 16.

Q. And what is the figure for the employees in the central office who similarly receive overtime pay at the rate of time and a half regular rate per hours in excess of 40 per week?

A. It would be approximately similar number, I believe.

Q. In the use of the word "overtime" throughout your testimony, this has been true, hasn't it, Mr. Anderson, that when you said "we do" or "do

(Testimony of John William Anderson.)

not pay overtime'' you were referring to overtime as a rate of pay which is one and one-half times the regular, is that right? A. That's right.

Mr. Gladstein: That's all.

(Witness excused.)

The Court: Now, how much time do you estimate you will require for argument?

Mr. Gladstein: One more matter before the argument, your Honor, and that is, the pages from the sugar manual of the Hawaiian Sugar Planters Association. I have been talking with Mr. Poole about this. The information I want [434] to offer in evidence can be offered in one of two ways. I can either ask the Court to issue a subpoena for the head of the H.S.P.A. and have him testify, or Mr. Poole can simply stipulate with me that the statistical data and other statements of fact contained in the pages which I want to offer in evidence are reasonably accurate and substantially true and correct. He may object, of course, as to their materiality but I am asking him merely to stipulate to certain pages as being statements of fact, reserving to him the right to object that these facts don't belong in this case. I have already indicated to him the pages of this manual that I want to offer, and I will indicate that to the Court now and make that offer of these pages as evidence and indicate what they contain.

I want to offer from this manual a page which is numbered nine and which is entitled "Organization." This continues to another page which sets

forth in tabular form the organizational set-up of the plantations, including the Waialua Company. I also want to offer page 10, which is a chart setting forth the organization of the particular plantation and referring to each and every plantation, including the Plaintiff Company. Then I want to offer page 17, beginning with that portion entitled "Refining of Hawaiian Raw Sugar," and page 18 which is entitled "Railroad System" and sets forth the mileage of track, the number of cars, engines, [435] and so forth, operated by the various companies. And I will ask Mr. Poole to indicate whether he is willing to make a stipulation, reserving his right to object, if he wants to, or whether I will have to subpoena someone from the H.S.P.A.

Mr. Poole: Your Honor, I take the position which I have tried to make clear throughout this trial, that none of the information which has to do with the general character of the plantations as such is indicated here, that is, information relating to the integration of the industry or to members of the plantations in the H.S.P.A., or any other information of that character is at all relevant. I make the same objection here. I see no relevancy whatsoever between the issues that your Honor is going to have to decide and what Mr. Gladstein now wants to put into the record.

I have a further objection, and that is, that much of this information is incorrect. It isn't even substantially correct. I want to call your attention to page 18. On that page you have a listing of the plantations and the railroad trackage which each

plantation has, the number of cars, and the number of locomotive engines, and the value. It is my understanding that that is substantially incorrect, that today several of the plantations have either dispensed with the railroad system of transportation or are doing so very rapidly, and it would give a completely inaccurate picture [436] to have that introduced in evidence as a fact. But I should like first to have a ruling from your Honor as to whether or not you regard this as relevant. And I repeat, it has nothing to do with whether the particular activity of the employees who have been named as Defendants in this suit and the Waialua Plantation are engaged in agriculture or engaged in the processing of cane.

The Court: Well, does Waialua depart from these general plans of organization, corporate organization?

Mr. Poole: They do to some extent.

The Court: Plantation organization?

Mr. Poole: I might say to your Honor, the stipulation carries the organizational set-up that we have at Waialua, and it is not fully in accordance with that organizational chart that you see there.

Mr. Gladstein: I don't understand that any departure is substantial, Mr. Poole. Do you claim that?

The Court: What is said to be the date of this? What time was this publication applicable in a descriptive way?

Mr. Poole: Some pages have been revised as of

1946; other pages are as much out-of-date as five years.

The Court: Who is responsible for this sugar manual?

Mr. Poole: The H.S.P.A. published it. That is indicated on the first page.

The Court: Is this publication for general public [437] information or for the information generally of the plantations which appear to be more or less cooperative?

Mr. Poole: I can't answer that question. I don't think that it's been distributed generally.

Mr. Gladstein: I have two copies.

Mr. Poole: Your Honor, also I think that if it goes in it ought to go in in its entirety. However, if it goes in in its entirety it presents a false picture. There is considerable in there about the perquisite system. The perquisite system has been abolished, as the stipulation points out. And what we are doing here is putting into the record a lot of material that is not only irrelevant but it is out-of-date.

Mr. Gladstein: Well, I don't want to put in material that is either irrelevant or out-of-date, and I am perfectly willing to agree that if page 17, the one that contains the trackage data, page 18—

The Court: Is that sofar as Waialua is concerned?

Mr. Gladstein: Yes.

The Court: The railway system description, with the exception of value, is that accurate?

Mr. Poole: I don't know but I will check on it

in a minute. I think that it is substantially correct in respect to Waialua.

Mr. Gladstein: I want to suggest that there is another [438] reason why this is material, now that counsel has indicated that the material seems to be accurate, and that is, that in the stipulation of fact and in the complaint we have statements that go beyond the Waialua Company. For example, we have statements of fact dealing with the percentage of output, not only of Waialua but of all the Companies. We have statements of fact with respect to the off season, not only dealing with Waialua but dealing with all of the plantations. We have numerous statements of fact concerning all of the other Companies who are members of the H.S.P.A. I think that it is material to complete this picture by getting the information into the record that I am offering here, and I take it that we must assume that Mr. Poole is not going to claim that the H.S.P.A., the association to which his Company belongs and which he represents here, puts out something that they wouldn't vouch for. That is at least in respect to those parts of it which refer to statistical data.

Mr. Poole: I will go so far as to say at the time it was compiled and published it was correct.

Mr. Gladstein: That's the pages I am referring to?

Mr. Poole: Certainly.

Mr. Gladstein: I think that that is—

Mr. Poole: I don't want to imply to the contrary.

Mr. Gladstein: I think that ought to be sufficient for the purpose of this record. Now, there are other things [439] in this manual, your Honor, that Mr. Poole says ought to be in here if any part is in. But I don't think that's correct. This is a loosely-bound—much of the information contained in this manual, as your Honor will note, has no relationship at all to the sugar industry. As a matter of fact, there is a little history of Hawaii and there is a lot said about legislation, the defense of Hawaii, things of that kind which are not material. There's also quite a bit of puffing in here and advertising on the part of the H.S.P.A. which I think does not properly belong in the category of statement of fact or evidence but rather represents the opinions or conclusions and would not be material. In any case, it does not follow that the admission of the pages which I offer call for the admission of any other parts of this manual.

Mr. Poole: I want to comment upon that, your Honor. You see what my adversary has done. He has gone through this book and he has selected about four pages which he thinks will strengthen his case in the way of prejudicial facts. I don't acknowledge that they do. But that's what he has done. He doesn't want to admit the balance of the manual at all. He opposes that and he says that while—the theories upon which he is trying his case are very broad, but they are not broad enough to include the entire manual but only those particular pages that he wants to put [440] in.

Mr. Gladstein: Well, just for example, your Honor, I happen to be a proponent of statehood for Hawaii; I am very hopeful that Hawaii becomes a

state; but I don't see that the statement on page six regarding the fact that people in Hawaii pay more taxes than 14 states on the mainland has anything to do with this case.

Mr. Poole: I think it has just as much relation as many of the things that you are pointing to.

Mr. Gladstein: I think that is argumentative. I will refer to the facts.

Mr. Poole: Well, it is a factual statement.

Mr. Gladstein: Also there are portions in here where the H.S.P.A. speaks about how kind and good it has been to labor. I submit that that is not material here and not admissible as a statement of fact. I am perfectly willing to let the H.S.P.A. be entitled to its own opinions on that subject but I don't think that its opinions are admissible in evidence any more than my opinions on the same subject might be. And mine, I think, might differ from theirs.

The Court: Will you make it a little clearer, please, just why you want this, these several pages?

Mr. Gladstein: Yes. Page nine, your Honor, and the page which follows, is entitled "Organization." It is out-of-date only so far as I can see with respect to one statement [441] in it, a statement referring to 36 plantations.

Mr. Poole: Thirty-eight.

Mr. Gladstein: No, 36 in the latest revised one. You are looking at an old one and mine is revised as of 8-15-46.

The Court: Each of the 36 plantations?

Mr. Gladstein: Yes, there are 32 instead of 36,

and there may be fewer as time goes on because of consolidation, merger and possibly going out of business of others. But it's still true that there are more than 30, and in any case the reference is to the plantations. Now, there you will find a statement of the functions of the H.S.P.A. and of the factors which represent the various companies, including the Waialua Company. I submit that that is material here to show the manner in which the industry operates. It is material to determine some of the issues that are raised in this case. One of the most important of the issues that your Honor is going to have to decide is going to be the relationship between what is done here in Hawaii and the refining process that takes place in Crockett and the marketing that takes place on the mainland. And your Honor will have to determine what, if any, effect that integration has upon the claims of the Plaintiff Company, and of course all companies, to exemption from the Fair Labor Standards Act. This material, therefore, shows what the organizational [442] set-up and integration is here at Hawaii.

The next page, page 10, which is the chart of plantation organization is substantially correct for all of the plantations, and to the extent that Waialua departs from this chart that departure is shown in the exhibits on file in this case. Page 16, at about the center of that page—

The Court: I don't recall your mentioning 16.

Mr. Gladstein: Seventeen. I'm sorry. Page 17, refining of Hawaiian raw sugar, this, I submit, is

clearly relevant. It carries through the actual operations of Waialua and the other plantations here. It's just as much material as if there had been a refinery set-up here in the Territory. Certainly if that were true we would be entitled to show that, how the unrefined sugar gets from the Waialua Plantation to and into the refinery, what is done about it. The fact is that that refining process takes place on the mainland, but I submit that doesn't make it any different.

Now, the next page is the portion which deals with trackage. I am perfectly willing to agree that to some extent the figures regarding trackage have been undergoing change to the extent that plantations have changed from the railroad form of transportation to other forms, particularly trucking. I don't think it makes any difference, however, because trucking is simply being used as a more efficient [443] method and is a substitute for the railroad system. And these figures as of a relatively recent date, within the last few years, were absolutely correct according to my understanding.

The Court: Did you want to say anything, Mr. Poole? [444]

Mr. Poole at this point objected to the introduction of Defendants' Exhibit No. 4 on the ground that the material that it contained was irrelevant and immaterial to the issues of the case.

The Court: The objection is overruled. The pages in the document are admitted as Exhibit 4.

(The documents referred to were received in evidence as Defendants' Exhibit 4.)

The Court: That is, pages 9, 10, 17 and 18.

The Clerk: Nine, 10, 17 and 18.

The Court: Was there one more?

The Clerk: No, your Honor, that's all.

Mr. Poole: Your Honor, I would like to request a recess of about ten minutes.

The Court: Is this upon the assumption that we are then going to argument?

Mr. Poole: I do not know. It may be necessary for me to call additional witnesses.

The Court: All right, recess for ten minutes.

(A short recess was taken at 10:10 a.m.)

After Recess

Mr. Poole: Your Honor, shortly before recess you asked me how long I thought we required for oral argument. I am a little uncertain but I want to ask for two hours. [446]

The Court: Two hours? Well, now, would it be convenient for you to do it in two sections? I mean that two hours would run us until half past twelve.

Mr. Poole: Yes.

The Court: I assumed that we would take about two hours for luncheon. Would it be convenient to you to stop about half way in your argument and then take the balance up this afternoon, say beginning half past one. And then, Mr. Gladstein, how long do you think you will want?

Mr. Gladstein: About half as long as Mr. Poole

expects to take, which will be one-fourth as long as he does take.

The Court: Then you may get through with yours this afternoon?

Mr. Poole: Well, how long will you allow me this morning under your plan?

The Court: Well, I am not going to put any limit on this argument, any time limit on this argument. I want all the information I can get out of the argument. I want to get all the views and slants that you gentlemen can give me. I know you are both ingenious.

Mr. Poole: Thank you.

The Court: And your full knowledge as to the righteousness of your opposing contentions, I want the benefit of that. If we can knock off at about half past eleven and then again begin about half past one, it would suit me [447] better. I have a tentative engagement during those hours. It is not necessary but tentative.

Mr. Poole: Yes. Well, I should like, if possible, to complete that part of my argument which relates to the application of the agricultural exemption this morning.

The Court: And that will take about an hour?

Mr. Poole: I should think so.

The Court: Well, you may proceed when you are ready.

Mr. Poole: All right.

(Mr. Poole presented the first part of his argument.)

(The Court recessed at 11:33 a.m.)

After Recess

Mr. Gladstein: Before he resumes argument, your Honor, I'd like to introduce a clean and unmarked copy of the document which is in evidence and known as Defendants' Exhibit 1.

The Court: Well, you had another marked copy, and you want to withdraw that?

Mr. Gladstein: Yes, if I may, your Honor.

The Court: And substitute this?

Mr. Gladstein: Yes.

The Court: Do you want to see this, Mr. Poole?

Mr. Poole: I should like to see that.

Mr. Gladstein: A clean copy substituting for the other one. [448]

Mr. Poole: It appears to be a clean copy and I have no objection.

The Court: Very well, the substitution is made. You may proceed when you are ready, Mr. Poole.

(Mr. Poole continued with his argument.)

September 23, 1947

(Mr. Gladstein presented his argument.)

(Mr. Poole presented his concluding argument.)

(The Court adjourned at 10:30 p.m.)

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 787, Waialua Agricultural Company, Ltd., vs. Ciraco Maneja, et al., held in the above-named court on September 18, 19, 22

and 23, 1947, before the Hon. Delbert E. Metzger, Judge.

October 13, 1947.

/s/ ALBERT GRAIN.

[Endorsed]: Filed May 26, 1948. [450]

[Title of District Court and Cause.]

AMENDED ANSWER AND
CROSS-COMPLAINT

Come now the defendants above named and, pursuant to leave of Court first had and obtained, the order therefor having been made at the trial of the above entitled action, and for the purpose of conforming the pleadings on file herein to the proof adduced at said trial, hereby amend the answer on file herein, and file the within pleading as an amendment to said answer and furthermore as a cross-complaint, and allege as follows:

I.

Each and every, all and singular, generally and specifically, the allegations and denials contained in the said answer on file herein are hereby reasserted and incorporated herein by this reference, save and except as modified by the allegations hereinafter set forth and made. [451]

II.

Defendants assert and allege that the exemption contained in § 13(a)(6), hereinafter referred to as the agricultural exemption, applies only to those

tasks and duties of work which are performed immediately and directly in the cultivation and tillage of soil, and the production, cultivation, growing and harvesting of sugar cane; that plaintiff is in no sense a farmer, nor does plaintiff operate a farm, within the meaning of §3(f) of the Fair Labor Standards Act of 1938; that each and every task not performed or connected directly and immediately with, and the energy for which is not directly or immediately expended upon, one or another of the aforementioned processes between cultivation of soil and harvesting of sugar cane, is in no wise within the said agricultural exemption, and by reason thereof employees performing such tasks are in no wise, during work weeks when they so perform such tasks, exempt from application of the wage and hour benefits of the said Act.

III.

Defendants assert and allege that the harvesting of sugar cane completes such agricultural character as may be properly said to exist, by virtue of the definition of "agriculture" within the said Act, in the operations of the plaintiff company, and that said harvesting is completed immediately upon the taking out and separation of sugar cane from the earth; that immediately upon the occurrence of said severance of sugar cane from the earth, whether the same be by cutting, machine or otherwise, a process commences which is in truth and in fact a process of transportation; that where sugar cane is harvested and placed in quantity at points of concentration, the said transportation process com-

mences immediately from and after the said cane reaches such points of concentration in the fields; that where, by reason of mechanization, sugar cane is severed from the soil and placed onto trucks, rail cars, or other means of conveyance, [452] by the same machine or machine process, such method is a combining and integrating of the last stage of harvesting and the first stage of transportation to and toward the mill; that each and every task performed from and after the point of completion of harvesting as hereinbefore described, to and including the bringing into the mill of said sugar cane and the placing of such cane into machines for the commencement of the first operation of sugar processing, is a part of a transportation process, and by reason thereof, is in no wise contained within either the definition of "agriculture" as contained in said Act, nor within the said agricultural exemption, and employees performing any of such tasks so referred to as transportation tasks are, during each and every work week in which they perform such transportation tasks, entitled to all of the wage and hour benefits of the said Act, without exemption or exception.

IV.

Within the mill of plaintiff, there takes place an operation known as the processing of sugar, and defendants assert and allege that the said processing operation commences with the washing of sugar cane, and not before, and by reason thereof, such tasks as are performed within said mill in connection with said sugar cane prior to the washing

hereof do not fall within any exemption provided for by § 7(c) of the said Act, hereinafter referred to as the sugar processing exemption, but to the contrary any tasks performed by employees in said mill at any point prior to the said washing of said sugar cane are fully covered by said Act, and employees performing the same in any work week are fully entitled to the benefits of the wage and hour provisions of the said Act, without exemption or exception.

V.

Defendants concede that certain tasks which are performed within the mill during the grinding season fall within the definition of the said sugar processing exemption. Defendants, [453] however, assert and allege that the only tasks and duties performed within said mill which properly fall within said sugar processing exemption, are those tasks and duties performed directly and immediately in connection with the processing of sugar cane; and by reason thereof, there are many tasks performed within the said mill by employees whose work is not directly or immediately connected with the processing of sugar cane, and such tasks are not exempt under said Act; and furthermore, there are many tasks performed within the said mill which, while connected with the processing of sugar cane in more or less direct and immediate nature, are not exclusively so connected, but to the contrary are connected with other and non-exempt operations, one of many illustrations of which is the work performed in the supplying of power which not

only operates the said mill but also is essential to, and connected with, the transportation phases and processes herein mentioned, as well as other operations conducted by plaintiff, and by reason of said facts employees performing such tasks are in no wise exempt from the law.

VI.

During the twenty-four hour period occurring each week when the mill is shut down and no processing of sugar cane into sugar is occurring, each and every task performed by any employee in such period is not exempt under the said Act, and each such employee is entitled, in each and every work week in which he performs such non-exempt work, and for the whole of such week, to all of the benefits of the wage and hour provisions of the said Act, without exemption or exception, regardless of the fact that during portions of the week when processing does take place, such employee may be performing exempt activities.

VII.

During the so-called "dead" or "off" season, when no processing of sugar cane occurs, each and every activity and duty performed by employees in and about the said mill is not exempt, [454] and employees working in and about said mill during said "off" or "dead" season are all entitled, for the duration of said "off" or "dead" season, to the full benefits of the wage and hour provisions of the said Act, without exemption or exception.

VIII.

During the period when grinding operations are taking place, the processing of sugar cane into sugar is completed when the crystals of sugar are removed from machines into either bins or bags; that from this point onward, and at all stages of work thereafter in the movement of such unrefined sugar through the process of transportation and shipment to the mainland, each and every activity and task performed by employees is not exempt under the said Act, and employees performing any of said tasks are entitled, in each and every work week in which any of such tasks are performed, to the full benefit of the wage and hour provisions of the said Act, without exemption or exception.

IX.

Defendants assert and allege that the plantation village, in which virtually all of plaintiff company's employees live, is and has always been necessary to and directly connected with the performance of plaintiff company's operations, and by reason thereof, the maintenance and repair of the said plantation village and the homes and stores and other buildings therein are necessary to the operation of plaintiff company's plant, and by reason thereof, each and every task and activity performed by workers in connection with the repair and maintenance of homes and other buildings in the said plantation village, or of parts or portions thereof, are tasks and activities necessary to and directly connected with the production by the plaintiff com-

pany of sugar for interstate commerce; that employees performing such tasks are neither exempt from nor not covered by the the said Act, but to the contrary are entitled to all of the benefits of the wage and hour provisions thereof, without exemption or exception. [455]

X.

Save and except as tasks or activities are herein admitted to be within any exemption provision of the said Act, all tasks, activities and work performed by defendants for plaintiff are within the coverage and protection of the said Act, and not within any exemptions contained in said Act.

XI.

Plaintiff company has failed and refused, since January 19, 1946, to compensate the defendants in accordance with the provisions of said Act, and to the contrary plaintiff company has claimed that many of the tasks and duties performed by defendants are either not covered by the said Act or exempt from the said Act, and by reason thereof, work weeks have occurred since January 19, 1946, in which defendants and other employees of plaintiff company have not received, for hours of work in excess of forty per week, compensation at the rate of one and one-half times the regular rate of pay; that by reason thereof plaintiff company has been and now is and continues to be in violation of said Act; and plaintiff company has asserted that it will continue its said practices, and by reason thereof further violations of the said Act will be committed by plaintiff company as aforesaid.

Wherefore, defendants reassert and reallege the prayer contained in the original answer on file herein, save and except as said prayer may be modified by reason of the allegations contained herein; that the Court in rendering judgment specify tasks and duties, rather than employee classifications, which are or are not covered or exempt under the said Act; that judgment be rendered in favor of defendants for unpaid overtime compensation, liquidated damages in amounts equal to such compensation, costs and attorney's fees up to and including the date of judgment or, in the Court's discretion, to a date later [458] than said judgment upon which computations are made to ascertain and determine the amounts of money owed by plaintiff company under such judgment; and for such other relief as may be just and proper.

Dated: October 31, 1947.

/s/ GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By RICHARD GLADSTEIN,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 3, 1947. [457]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Comes now the plaintiff above named, by its attorneys Rufus G. Poole and E. C. Moore, and for answer to the Cross-Complaint herein appearing in

work in connection with the repair and maintenance of the plaintiff's houses and related facilities as described in [458] paragraph 35 and other paragraphs of the Complaint.

II.

During all periods of time referred to in paragraph XI of the Amended Answer and Cross-Complaint, all the defendants have been employees "employed in agriculture" within the meaning of Section 13(a)(6) of the Act and therefore have been exempt during all such periods from the overtime provisions of the Act as provided in said Section 13(a)(6).

paragraph XI of defendants' Amended Answer and Cross-Complaint, admits, denies, and alleges as follows:

I.

Plaintiff denies each and every allegation contained in paragraph XI of the Amended Answer and Cross-Complaint except that it admits that (a) it has claimed that many of the tasks and duties performed by defendants are either not covered by the Fair Labor Standards Act (hereinafter referred to as the Act) or are exempt from the Act, (b) plaintiff did not compensate some of the defendants during some of the work-weeks since January 19, 1946, for hours of work in excess of 40 but not in excess of 48 per week, at the rate of one and one-half times their regular rate of pay, and (c) the defendants are within the coverage provisions of the Act save when they are engaged in

III.

During all periods of time referred to in paragraph XI of the Amended Answer and Cross-Complaint all the defendants have been employees of an employer, i.e., the plaintiff which has been engaged during all such periods in the "processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup," and by reason thereof, as provided by Section 7(c) of the Act, all the defendants have been exempt during all such periods from the overtime provisions of the Act.

IV.

For the period January 19, 1946, to May 13, 1947, inclusive, the act or omission, if any, of plaintiff to pay the defendants in accordance with the claims of defendants as set forth in paragraph XI of the Amended Answer and Cross-Complaint, was in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals, and interpretations of agencies of the United States and in good faith in conformity with and in reliance on administrative practices and enforcement policies of agencies of the United States with respect to the class of employers to which plaintiff belonged. Pursuant to Section 9 of the Portal-to-Portal Act of 1947, therefore, plaintiff is not liable to the defendants or any of them for any act or omission during the period January 19, 1946, to May 13, 1947, inclusive, [459] complained of by defendants.

V.

For the period since May 14, 1947, the act or omission, if any, of plaintiff to pay the defendants in accordance with the claims of defendants as set forth in paragraph XI of the Amended Answer and Cross-Complaint, was in good faith in conformity with and in reliance on written administrative regulations, orders, rulings, approvals, and interpretations of the Administrator of the Wage and Hour Division, U. S. Department of Labor, and in good faith in conformity with and in reliance on administrative practices and enforcement policies of the said Administrator with respect to the class of employers to which plaintiff belonged. Pursuant to Section 10 of the Portal-to-Portal Act of 1947, therefore, plaintiff is not liable to the defendants or any of them for any act or omission during the period since May 14, 1947, complained of by defendants.

VI.

During all periods of time referred to in paragraph XI of the Amended Answer and Cross-Complaint, the act or omission, if any, of plaintiff to pay the defendants in accordance with the claims of defendants as set forth in said paragraph, was in good faith and plaintiff had reasonable grounds for believing that such act or omission was not a violation of the Act as amended. The court therefore, pursuant to Section 11 of the Portal-to-Portal Act of 1947, should in the exercise of its discretion award no liquidated damages to defendants.

VII.

To the extent that the alleged rights of action set forth in paragraph XI of the Amended Answer and Cross-Complaint did not accrue within one year prior to the date of the filing of said Amended Answer and Cross-Complaint, said alleged rights of action are barred by the provisions of Act 174 (Series D-177) [460] of the Session Laws of Hawaii 1945, enacting and incorporating Section 10429.01 into the Revised Laws of Hawaii, 1945.

Wherefore plaintiff prays that defendants take nothing by their Cross-Complaint, that the Cross-Complaint herein be dismissed and that plaintiff have such other and further relief as may be proper in the premises.

Dated November 15, 1947.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

Attorneys for Plaintiff Waialua Agricultural Company, Limited.

I hereby certify that I served a copy of the foregoing Answer to Cross-Complaint upon the attorney for defendants, Richard Gladstein, by sending such copy to him on this date by registered mail, airmail, addressed to him at 240 Montgomery Street, San Francisco, California.

/s/ RUFUS G. POOLE.

November 15, 1947.

[Endorsed]: Filed Nov. 19, 1947. [461]

[Title of District Court and Cause.]

JOINT MOTION FOR SEPARATE TRIAL
PURSUANT TO RULE 42(b)

Plaintiff and defendants jointly move the court for an order directing a separate trial of the issues presented by Paragraph XI of the defendants Amended Answer and Cross-Complaint (counterclaim) and plaintiff's Answer (reply) to said Cross-Complaint (counterclaim), and for a further order directing that such separate trial take place subsequent to the determination by the court of the issues presented by plaintiff's Complaint for declaratory judgment herein and defendants' amended answer thereto. It is respectfully submitted that the allowance of this motion will further the convenience of both the plaintiff and defendants and also the court, because the determination of the issues presented by the plaintiff's complaint for declaratory judgment herein and defendants' amended answer thereto may render unnecessary or considerably abbreviate the trial of the issues for which a separate trial is herein requested. The parties also respectfully call to the court's attention the fact that their respective counsel stipulated in open court on September 23, 1947, that the issues presented by defendants' Cross-Complaint (counterclaim) should not be tried until the court determined the issues presented [462] by the plaintiff's Complaint for declaratory judgment herein and defendants' amended answer to said Complaint.

Wherefore, in furtherance of convenience to the parties and the court, plaintiff and defendants pray that the court order a separate trial of the issues presented by Paragraph XI of the defendants' Amended Answer and Cross-Complaint (counterclaim) and plaintiff's Answer (reply) to said Cross-Complaint (counterclaim), and further order that said separate trial take place subsequent to the determination by the court of the issues presented by plaintiff's Complaint for declaratory judgment herein and defendants' amended answer thereto.

Dated Honolulu, T. H., this 22nd day of March, 1948.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

Attorneys for Plaintiff.

/s/ RICHARD GLADSTEIN,

/s/ MYER C. SYMONDS,

Attorneys for Defendants.

[Endorsed]: Filed March 22, 1948. [463]

[Title of District Court and Cause.]

ORDER GRANTING JOINT MOTION
FOR SEPARATE TRIAL

A Joint Motion having been filed by plaintiff and defendants asking for an order directing a separate trial on certain issues herein, and the said motion having been presented to the court and the court having been fully advised, and good cause appear-

ing for the granting of said motion pursuant to Rule 42(b) of the Rules of Civil Procedure for the District Courts of the United States,

It Is Hereby Ordered that the said motion be granted and the court hereby orders a separate trial of the issues presented by Paragraph XI of the defendants' Amended Answer and Cross-Complaint (counterclaim) and plaintiff's Answer (reply) to said Cross-Complaint (counterclaim); and

It Is Further Ordered that said separate trial shall take place subsequent to the court's determination of the issues presented by plaintiff's Complaint for declaratory judgment herein and defendants' Amended Answer thereto.

Dated Honolulu, T. H., this 22nd day of March, 1948.

/s/ D. E. METZGER,

Judge of the United States District Court for the District of Hawaii.

[Endorsed]: Filed March 22, 1948. [464]

[Title of District Court and Cause.]

FINDINGS WITH CONCLUSIONS

Arising from diverse view, such as to create an actual controversy, of the intent, meaning, and application of certain sections of the Fair Labor Standards Act of 1938, the plaintiff, as a fairly representative plantation of the sugar industry in Hawaii, brought this action by agreement with col-

lective bargaining representatives of certain of its employees, praying for a declaratory judgment to determine its rights under the Act as an Employer, and the rights of the defendant-employees named, as well as all other of its employees engaged in work of a similar kind. The Court is satisfied, after examination, that it has jurisdiction to deal with this matter in a declaratory judgment, under Rule 23(a), Federal Rules of Civil Procedure, and Section 24, as amended, and 274d of the Judicial Code. *Tennessee Coal, Iron & Railroad*, 321 U. S. 590; *Jewell Ridge Coal Corporation*, 325 U. S. 161.

The plaintiff is one of the larger corporations in Hawaii engaged in nearly all the activities necessary to the production of raw sugar and molasses and the marketing of these commodities in the United States. Its cane goes to its own sugar mill and practically all of its raw sugar goes to the California-Hawaiian Refinery at Crockett, California, for further processing and sale as refined sugar.

In September, 1946, it employed in various work on its plantation property 1,144 persons; in years past the number of its employees was twice or more greater. During 1945 it produced 56,193 tons of raw sugar, being the third largest producer in Hawaii. Its farming and factory operations are carried on in the northwestern side of Oahu about thirty miles from Honolulu. It grows and harvests cane on about 9,660 acres of land owned and leased by it. The activities performed in the carrying on

of its entire business are quite numerous and diverse. Among other things they include clearing and preparation of land, preparation and transportation of seed, planting, cultivating, irrigating, fertilizing, spraying weeds with herbicides and cane with insecticides, harvesting, road and railroad building and maintenance, surveying, water development, ditching and ditch and flume tending and upkeep, fencing, reservoir operation and maintenance, water pump operations and pipe line maintenance, machine installation, moving, and operations of various kinds, as passenger conveyances, trucks, tractors, locomotives, bulldozers, grappling and loading cranes and others, railroad operations for various carrying purposes, stores, warehousing and offices, machine shops, service shops, welding shop, blacksmith shop, tinsmith shop, repair shops, electrical shop and the generating and distribution of electric current, carpenter shop, paint shop, plumbing shop, garage and automotive repairs, roundhouse, chemistry laboratory, concrete [466] products plant, stables, lumber yard, firewood gathering and distribution, weighing, unloading and washing cane, removal and distribution of refuse, milling and processing cane into sugar and molasses, warehousing and loading sugar for shipment, handling bagasse and mill waste, repairs and upkeep of many structures, including electric lines, building and repairing dwelling houses of which the company owns 820, maintaining hospital, sanitation work, garbage disposal, street cleaning, tree

pruning, recreation club houses, gymnasium and athletic fields upkeep, together with numerous other activities.

The quality of employees range from hoe-men and common laborers to highly trained artisans and mechanics, surveyors, engineers and technicians, with accountants, cashiers, statisticians, personnel men, overseers, timekeepers and storekeepers.

The farming operations of the plantation are continuous the year around, various activities such as planting, cultivating or harvesting going on in different fields at the same time. Crops come to maturity in from twenty to twenty-four months in different fields, and this is all planned to coordinate with harvesting and milling operations which are suspended about three months each year. Mill operations are on a six-day a week basis and continuous around the clock in three 8-hour shifts; several other activities are largely in two 8-hour shifts; depending on seasons.

The main managerial business of the corporation is conducted through a plantation agency house in Honolulu where most of its officers and directors are centered. The manager, residing on the plantation, is essentially a superintendent of plantation operations and he and his aides plan and direct the timing and coordination of all principal activities, other than those managed by Honolulu officers.

The questions presented are:

1. Are the employee-defendants, and all other employees similarly situated, "employed in agri-

culture” as the term “agriculture” is defined in Section 3(b) of the Act, and therefore exempt from both the minimum wage and overtime provisions of the Act, as set forth in the exemption in Section 13(a)(6) of the Act?

2. If said employees are not so exempt, are any or all of them exempt from the overtime provisions throughout the year, or any part thereof, by virtue of Sec. 7(c) of the Act which provides that “in the case of an employer engaged . . . in the processing . . . sugar cane . . . into sugar (but not refined sugar) or into syrup,” the overtime provisions of the Act (but not the minimum wage provisions) “shall not apply to his employees in any place of employment where he is so engaged?”

3. Are the employee-defendants, and those employees similarly situated, when they are engaged in any one week exclusively in building, repairing or maintaining plantation houses or related domestic facilities, “engaged in commerce or in the production of goods for commerce” as the term “commerce” and “produced” are defined in Section 3(b) and 3(j) of the Act?

Sections and subsections of statutory provisions of the Act which are involved, are as follows:

Section 3(b) “‘Commerce’ means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.”

Section 3(c) “‘State’ means any State of the

United States or the District of Columbia or any Territory or possession of the United States.”

Section 3(f) “ ‘Agriculture’ includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”

Section 3(j) “ ‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.”

Section 6 provides for Minimum Wages to be paid to all employees engaged in commerce or in the production of goods for commerce. Minimum wages are not here in controversy.

Section 7(a) provides for Maximum Working Hours for employees who are engaged in commerce or in the production of goods for commerce, except as otherwise provided in this section, and sub-section (c) of the said section provides, "in the case of an employer engaged in the first processing . . . of sugar beets, sugar beet molasses, sugar cane or maple sap into sugar (but not refined sugar) or into syrup, the provisions of sub-section (a) shall not apply to his employees in any place of employment where he is so engaged." [469]

Section 13(a), provides that Sections 6 and 7, as above, of the Act shall not apply with respect to, "(6) any employee employed in agriculture."

The contentions of the plaintiff are:

"a. That all the employee defendants, as well as all other employees of plaintiff similarly situated, are employees 'employed in agriculture' as the term 'agriculture' is defined in Section 3(f) of the Act and that, therefore, all employees are exempt from the overtime provisions of the Act, i.e., Section 7(a), as provided by Section 13(a)(6) of the Act;

"b. That the employee-defendants and any other employees of plaintiff similarly situated, who are engaged in the transportation of sugar cane from the fields to the mill, the processing of sugar cane into raw sugar including the temporary storage and shipment of raw sugar, and their necessary and related operations, are also exempt from the overtime provisions of the Act by virtue of Section 7(c) thereof, since they are employees in a place of employment where their employer, i.e., the plaintiff, is

engaged in the 'processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup . . .'. In this connection plaintiff further contends that such exemption is applicable throughout the year, including the 'off season', and

"c. That the employee defendants, when they are repairing and maintaining the plantation houses and related domestic facilities, and all other employees of plaintiff when they are performing similar work are not 'engaged in commerce or in the production of goods for commerce' as the terms 'commerce' and 'produced' are defined in Sections 3(b) and 3(j) of the Act, and therefore the provisions of the Act do not apply to said employees; but even if they [470] are so engaged, they are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c)."

The contentions of the defendants are:

"A. That none of the defendant-employees, nor other employees of plaintiff similarly situated, are exempt from the provisions of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c), save as follows:

(1) Such employees may be exempt under Sec. 13(a)(6) during the work-weeks when they are engaged exclusively in work performed immediately and directly in the cultivation and tillage of the soil, and the production, cultivation, growing, and harvesting of sugar cane. In this connection defendants contend that harvesting is completed immediately upon the severance of the sugar cane from the earth so that where sugar cane is severed from the soil and thereafter placed into rail cars, even

though by the same machine or machine process, the placing of the cane into rail cars is not harvesting and is not exempt.

(2) Such employees are exempt under Sec. 7(c) during the work-weeks when they are engaged exclusively in tasks and duties performed directly, immediately, and exclusively in connection with the processing of sugar cane. In this connection, defendants contend that the processing of sugar cane is commenced with the washing operation at the mill and is completed when the crystals of sugar are removed from machines into either bins or bags. Hence tasks performed by employees of plaintiff prior to the washing operation, as well as after the raw sugar is placed in bins or bags, are not exempt. Defendants further claim that none of plaintiff's employees working in and about plaintiff's mill are exempt under Sec. 7(c) during [471] the off-season referred to on page 32 et sequi of the Stipulation of Facts on file herein, or during work-weeks in the grinding season when they perform any work in and about the mill during the 24-hour shutdown period referred to on page 21, et sequi, of the Stipulation of Facts.

“B. That all of the employee-defendants and all other employees of the plaintiff who are similarly situated, including those engaged in the maintenance and repair of plaintiff's dwelling houses and other facilities, are ‘engaged in commerce or in the production of goods for commerce’ within the meaning of Sec. 7(a) of the Act.”

* * * *

When the burden is placed on a busy trial court to interpret singlehanded the true and full meaning of a complicated Act of Congress out of which important conflicting contentions have arisen, the judge is, quite naturally, in a difficult situation, particularly where the matters involved are of grave importance to a great industry and affect in a heavy degree the interests of a large number of working-men, knowing as he does that other courts have held divergent views as to some of its parts and that his reasoning and findings will be placed for scrutiny and analysis before higher courts and eventually the highest court of the Nation. However, the life of a trial judge seldom runs in still waters, and the best he can do is to give his best efforts without wasting too much time in research and refinements.

At the beginning, I will say that in my opinion, practically every person employed in the work of a sugar plantation in Hawaii is employed in "commerce" as it is defined and dealt with in the Fair Labor Standards Act. [472] The work, purpose, and aim of a sugar cane plantation is to produce the greatest possible amount of high content cane at the least cost, and then extract, or have extracted, the greatest profitable amount of juice from it and turn it into raw sugar and molasses for further refining and marketing abroad, and in the case of plaintiff, every person employed by it in furtherance of sugar production is, in such employment, an interlocking part of "commerce," whether his employment is in the fields, installing, operating or

repairing machineries, cleaning yards surrounding plantation labor houses, or checking finished raw into carrier conveyances, and irrespective of whether or not his work comes within the two exempted classifications, "agriculture" or "processing". He need not be working directly in the production of any "commerce" commodity, so long as his occupation is specially necessary in the practice undertaken for its production.

The first contention of the plaintiff, that all of its employees are "employed in agriculture" as the term "agriculture" is defined in the Act, and are therefore exempt from the entire operations of the Act, would, of course, dispose of the case at once if adopted. I cannot possibly accept this as the intent and meaning of the law.

In framing the definition of "agriculture" Congress made it broad enough to cover every operation of preparing the soil and growing and harvesting sugar cane and, in the event it were marketed by the farmers, preparing and delivering it to market—everything incidental to "or in conjunction with such farming operations", but it certainly is clear that Congress did not mean nor desire this definition of "agriculture" to be construed to cover or include the "processing" of sugar cane into raw sugar; it would not have [473] done part of its work over again by formulating and enacting subsection (c) in Section 7, exempting the "first processing" of sugar cane from the maximum working hours provisions of the Act if it had intended "agriculture" to embrace this exemption. It is perfectly

clear that Congress considered processing as something different from farm operations and not conjoint with it.

It is also quite certain that in framing and enacting the Fair Labor Standards Act, Congress had definitely in mind the humanitarian view that the time had come in American industrial affairs when workmen in interstate commerce transactions (which was as far as Congress could reach industry's hours and wages in legislation) should receive a fair standard of wages and be required to work for that wage no longer than forty hours (after 1941) each work-week. That this would add a burden on industry which, in all probability, would have to be passed on to the consumer was well known. Relief to workingmen was the overall consideration and purpose of the Act, as declared by the President, and as set forth in the "findings and declaration of policy" in Section 2 of the Act.

In the case of *A. H. Phillips, Inc., vs. Walling*, 324 U. S. 490, 493, Justice Murphy speaking for the court, said:

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmis-

takably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.” [474]

Numerous courts and cases in dealing with the Act have emphasized that it is broad and comprehensive, having the special purpose of covering all workmen in commerce or the production of goods for commerce—except those specifically and clearly exempted—and that its remedial purposes should be liberally construed and its exemptions to coverage should be narrowly construed; this is reiterated many times and in many cases.

If we follow this concept, and I believe that to be the duty of the court, then it is plain that “agriculture”, while it clearly includes farming in all its branches, several of which are enumerated in the Act’s definition, as well as “other things”, not specified, and practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, leaves a number of the operating acts and agencies of the plaintiff outside the definition of farming or “agriculture”. My view is that the “other things” included in farming practices and incident to and in conjunction therewith, but not specified, were intended to cover the farming practices that are applicable and incidental to situations that may arise in the development of various kinds of produce in agriculture, horticulture, stockraising, bees, nurseries, forestry, etc., such as spraying, fertilizing, irrigating, pruning, pollinating, grafting, fire or frost protections, milking, slaughtering, shearing, hide preservations, castrat-

ing, branding, and similar practices that appertain to particular branches of farming, nursery and ranching. [475]

It is conceivable from the theory advanced in plaintiff's first contention, that if an agricultural enterprise becomes large enough to embrace within its ownership and management a number of distinctively separate industrial operations which, when standing alone are indisputably covered by the Act, the exemptions given to it as a farm, would become applicable to all of its combined industrial operations. I cannot follow this theory all the way, for its application could work a defeat of the humane purposes of the Act through an increasing growth of powerful industrial concerns in acquiring ownership and bringing under their management non-agricultural sources of supply, and thus separating more and more workers from the wage and hours benefit of the Act and could even defeat "oppressive child labor" provisions contained in it.

A number of sugar plantation corporations in Hawaii are rapidly expanding by amalgamation with others and growing larger in capital resources and operations. The president of Hawaiian Sugar Planters Association in his annual report a number of years ago made the following logical and frank statement, which was printed in local newspapers, as well as in the Congressional Record:

"As has been emphasized again and again, the primary function of our plantations is not to produce sugar, but to pay dividends."

If the situation were one involving a group of farmers who grew and harvested cane, the cane being transported by a railroad company or an independent trucking concern to a separately owned factory which processed it, plainly the agricultural exemption would be confined to the activities of the farmers. The transit activities of the railroad [476] company could in no way be said to come under the agricultural exemption, no more than could the operations of a fertilizer factory from which the farmers procured their needed fertilizer. Similarly, the factory operations would be wholly separate from agriculture. Assuming that the farmers, the carrier, the fertilizer factory and the milling company united together, forming a corporation, and took title as a sugar plantation company, would it be entiled over all to the exemption intended for and given to the farmers? I do not think so; the substance of the situation is controlling, not its form, and the ownership and management of these several links that may be united together in the production of raw sugar and molasses does not seem of importance in construing the Act's meaning of "agriculture."

Plaintiff lays stress on the definition of the word "production" (Sec. 3(j)) and construes it to cover all forms and activities of transportation. I do not so construe the words "handling" and "transporting" as used in this Section. My opinion is that they refer to those operations in "agriculture," such as are involved in this case, in planting seed, promoting growth, harvesting, assembling produce

for carriage, and associated activities up to that point; and in "processing," to the handling and transporting activities involved in getting the cane from the mill yard through the cleaning process, weighing it, and then into and through the mill and other processing operations to the point of shipment as raw sugar or molasses. True, some cases hold the meaning of both "agriculture" and "processing" to be restricted to much narrower activities than those above mentioned. We may never know with certainty the correct answers until the Supreme Court gives them. [477]

The plaintiff contends that its employees who work in transporting cane from certain places in the fields to the mill are performing work essentially incidental to or in conjunction with a purely agricultural pursuit. A decision of the First Circuit Court of Appeals in *Vives vs. Serralles*, 145 F. 2nd, 552, found distinctly different, holding that, in the facts of that case, from the point of concentration of sugar cane in the fields, through the transportation operations thereafter up to the mill itself, such transportation activities were incidental to the operations of the mill and not to agriculture. I cannot believe that either view is correct. The agricultural aspect terminates upon the harvesting and loading of the cane into cars for transport to the sugar factory. The train crews are not engaged in any act of producing sugar cane, nor in processing it into sugar merely because they are employed by the same company that employs the farm hands or processing crews, and Section 7(c) does not em-

brace activities which are "incidental" to or in conjunction with mill operations. It does not mention incidentals. In this section, the Congress expressed its intention of exempting from the maximum hours provision of the Act only those mill employees engaged in processing cane into raw sugar or molasses. Railroad operation is a systematic business calling for the employment of skilled, experienced men, trained to quick, keen preception (not farmhands or millhands) for handling locomotives and moving cars (not the goods in transit) and for the maintenance of roadbed, track and structures, and roundhouse care and servicing of locomotives—all specialized technical work. It is as different from farming or processing operations as day is to night. The nature of work [478] an employee does, that is the thing that controls the question as to whether his work is within or without the protection of the Act, not the classification that his employer, whether farmer, manufacturer, or exporter, gives to the job.

"In determining whether an employee is exempt from this chapter, the criterion is the character of work performed as disclosed by the record rather than the title of employee's position." *Walling vs. Snyder Min. Co.*, 66 F. Supp. 725.

If a man is employed to drive a timbered tunnel into the earth he is employed as a miner, no matter if a farmer hires him, pays his wages, and the tunnel is on a farm, nor would it matter how need-

ful the tunnel was to the economy or facility of the farmer's business in connecting two divisions of his farming business; he could not be classed as an exempted farm employee, irrespective of whether his work was in or out of commerce.

I consider mainline railroading as entirely apart from agriculture, as defined in the Act, even though the road may be owned by one engaged in agriculture and hauls nothing but agricultural produce produced by him, and this would apply to automotive trucking of produce for processing as well. About 462,500 tons of cane are handled on Waialua Plantation in a year—a very substantial transport operation, over many miles of trackage.

If Congress had said that raw sugar production should be given an exemption from the operation of the Act, that would have been a different proposition; but the parts of the Act here dealt with exempts only agriculture or farming on one hand, and processing on the other. As an illustration: If lumber production were exempted, it would include logging and all forms of transportation and other operations necessary to the business up until the production of lumber. But if two factors only, that is, forestry, [479] including its harvestry and its "preparation for market, delivery to storage or to market or to carriers for transportation to market," and lumber mill processing (but not surfacing or other refinements) were given different and separate exemptions, then the transportation of the logs from the forest to the distant mill would be a separate activity, so distinct in its nature that we

could not extend the reach of either forestry or milling exemptions to encompass it.

In my opinion, all employees who are employed in or on the roadbed, tracks, structures, cars and locomotives of plaintiffs' railroad system, including round house and rolling stock, repair and building shops, and flagmen, watchmen and dispatchers, are covered by the Act. Further, I believe that where automotive trucks are substituted for locomotives and cars in carrying plantation freight, their operators likewise, with their upkeep crews, are covered.

As to the portable tracks for getting loaded cane cars in and out of the fields for loading and back to the reach of locomotives, as described in this case, my opinion is that the laying and shifting of these sectional tracks and the loading and moving, by hand, horse or tractor of cane cars placed upon them is a part of the harvesting operation and the assembling of the harvested crop at centralized points ready for transportation, and is therefore incidental to cane farming. Certainly all the ordinary field operations, pertaining to the growing and harvesting of a cane crop, come within the exemptions given to farming, and this is such a field operation. Also, the picking up and reloading by field employees of cane stalks which have fallen from cars between the fields and mill, I consider a part of harvesting. [480]

Good argument, supported by authorities, has been advanced by defendants that these operations performed on laying and shifting portable tracks

and the moving of cars over them are not covered by any exemption, as they are neither agricultural or processing work, but performed by separate gangs of men who are specialized and work at nothing else during harvesting seasons, touching neither farming, harvesting or processing. This presents a close question, however, my reasoning dictates that this work being necessary to and closely related to harvesting and loading, in positioning and spotting empty cars in the fields and then getting them off the tillable fields, back to points where they can be reached by locomotives operating on the mainline, is, under practices long established and prevailing on plaintiff's plantations, an essential part of harvesting.

We now come to the mill or factory operations, which are exempted as to hours, but not as to wages, to consider how far this exemption was intended to reach.

Congress was clearly aware of the fact that harvested crops and many horticultural and farm produce, including sugar cane, are subject to rapid deterioration and perishment, and, from discussions at Congressional hearings, it appears that a number of members of Congress were unquestionably acquainted with sugar cane and suger beet farming as practiced in their sections of the country where such crops are seasonal and often come to the processing plants from numerous producers whose harvesting operations and transporting facilities may be not fully coordinated with milling operations. It is plain that in sympathy with the problems of this

class of seasonable crop farmers and processors, and in public interest as to sugar consumers, which includes practically every household of the nation, Congress felt not only justified but eager to relieve them and all other perishable crop processors [481] of the burden of overtime wages (for fourteen weeks of each year, as to other farm produce processors) to employees in any place of employment where they are engaged in the operation of "first processing".

We have seen that this exemption to "processors" is separate and distinct from the exemption given to "agriculture"; it is a lesser and limited exemption. How far does it reach outside of the processing plant, or mill, in the case of sugar, if any distance? My opinion is that the Act was intended to reach the produce to be dealt with after it is brought alongside its unloading platforms or delivered to it in its storage yard in which it has its own facilities, by gravity and mechanical traction, for bringing it into actual processing operations.

From there on, Section 7(c) of the Act clearly exempts all acts that are involved in processing the cane into raw sugar, and I hold that this includes weighing, cleaning, crushing, juice treatments, crystallizing, and the bagging of the product and the removal of it from bagging and sewing machines and depositing it in an adjacent warehouse, bins, tanks, or directly into cars or trucks, if immediately available alongside the bagging room, for shipment. With these several operations through

the factory the processing is begun and finished in the place where the processor is so engaged. Place where processing is carried on, conveys to my mind a meaning of the entire operating plant devoted to processing usage, whether within a building or open yard, and whether work there performed is mechanical or manual.

Evidence and argument discloses that in the boiler room, attached to the factory, steam is produced by burning bagasse, also fuel oil, under boilers and that part of this steam is used in engine power in driving the mill and otherwise in processing operations, and that part of it is used [482] to generate electricity in a separate building, some of which electricity is used in the mill and mill yard, as well as in the fields, and some in lighting employees' houses, offices, and for various domestic, recreational, and other purposes; occasionally small surplus amounts are sold to a public utility company. This usage raises a question as to whether or not the boiler room operations are exempt from the operations of the Act.

In the administration of the Act the Administrator, whose powers and duties are provided in the Act, has had the necessary duty from the beginning and from time to time of interpreting the Act. In an Administrative Interpretative Bulletin No. 14, which was put in evidence, the statement is made in paragraph 23(a):

"It is our opinion, therefore, that only the employees who perform the operations that are so closely associated thereto that they cannot be seg-

regated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by the exemption. For example, in the ordinary case none of the employees in a department separate from the department in which the exempt operations are performed will be exempt."

And in Paragraph 18 of this Bulletin we find the following:

"Operations performed on bagasse, such as removing same from the sugar mill, baling and compressing, are not included in the exemption, since such operations do not constitute the 'processing of . . . sugar cane' and further such operations do not result in sugar or syrup. The exemption, it should be noted, is limited to the processing of sugar cane 'into sugar . . . or into syrup'."

While it is true that administrative interpretations are not necessarily binding on courts, all courts agree that they are entitled to careful consideration and weight, particularly if they have had a controlling effect for a considerable length of time. So far as I have been able to find, the above cited interpretation has not been discarded [483] by any court, but was affirmed in *Shain vs. Armour & Co.*, 50 F. Supp. 907, and *Walling vs. Bridgeman-Russell Co.*, 2 Wage & Hour Cases, 785-790—this rule is not inconsistent with the manifest intention and spirit of the Act and was clearly for the purpose of suppressing mischief and promoting the remedy.

It is my opinion that the rule is sound, that where an employee in commerce is assigned to perform,

n a given work-week, some work which is exempt and some which is not exempt, all of that particular employee's activities for the entire week are entitled to the protection of the Act. The work-week is the basis for measuring maximum hours time in Section 7 and, if no basis were adopted, there would be uncertain protection to employees in many conceivable cases. I therefore hold that employees in and about the boiler room who work in supplying fuel to the boilers, and those who tend the engines, dynamos, and other machinery and equipment used to generate and transmit electricity, are covered by the Act, whether they are in or outside the mill buildings.

This rule applies to and brings within the full protection and benefits of the Act every plantation employee of the plaintiff who works any part of any work-week in employment that is not exempted by either the agriculture or processing exemptions. In making this clearer, I will say that if an employee works part of a work-week in farming in the fields or in processing and the remainder of the work-week in employment not incident to or in conjunction with field farming work or directly and exclusively connected with processing operations, he is covered by the Act for the full work-week; if he works the entire week in either or both farming and processing, he is not covered, as the employer in both activities is exempt. [484]

Now, as to "off-season" work, in the processing plant and elsewhere. If we are to follow the strict construction rule as to exemptions, and I believe it incumbent on me to do so as, so far as I can find,

a preponderance of other courts do, then it is clear, in this case, that there is no processing during the time the processing plant is shut down—other than occasional drying of small amounts of low grade sugar called massecuite and the processing which nature performs in the crystalizers and on heavy molasses in settling tanks.

It matters not whether the processing operations are discontinued for a day or three months so long as there is a complete shutdown or suspension of processing. However, it is my opinion that a halt in some operations on account of breakdown of machinery or other gear or service, so long as any mechanical or manual processing operations are in action and the operating staff is in part working or standing by waiting for repairs or adjustments to be made, is not a discontinuance of processing, unless and until workmen in the essential factors of processing are released from those duties.

I am aware that all authorities do not agree with this view as to shutdowns, one or two believing that seasonal cleanups and repairs, even new machinery installations, are an essential part of processing, but my opinion is that this strains the meaning of processing and could carry it into a great variety of capital expenditures and side lines. Getting ready to process is not processing, nor is cleaning up after the processing is done. The employee, as well as the employer, must, at the time, be “engaged” in the processing to bring into operation the exemptions; it is not enough that the employer be merely established in the business of processing.

I lean strongly to the view expressed by the district judge on the ground in the Puerto Rican case of *Mainsonet vs. Central Coloso, Inc.*, 2 Wage & Hours Cases, 753, wherein the court said:

“The primary purpose of the exemption in question is to permit the employment of persons in seasonal industries, particularly where perishable commodities such as sugar cane is concerned, without the hardship of paying overtime * * *. But this situation does not obtain during the dead season. There is no similar reason why employees should work more than 40 hours in ‘construction and repair work and preparation of the mill for the coming grinding season (azfra).’ ”

In the *McComb vs. Consolidated Fisheries Co.*, case cited by plaintiff, it appears that the court’s judgment was swayed by the view that there was no shutdown season in that case, as processing continued daily and some 200 tons of fish scrap were processed during the time that no additional fish were brought into the plant.

* * * *

Both parties stipulated orally in the trial and have since done so in writing, praying for a special hearing on the status of each one of the employee-defendants whose work is discussed in the pleadings and voluminous stipulations.

Inasmuch as all parties seek declaratory guidance from the court in respect to future activities and pay practices, as well as a determination of past liability, it seems appropriate, if not incum-

bent upon the court, to say again and indicate at random a few situations which would call for application of the rule that commingling the work of employees in exempt activities with activities that are not exempt under the law, brings all activities of that employee, within any work-week, under coverage of the Act. [486]

The burden of proof is upon the plaintiff to show that an employee comes within the exemptions. *Bowie vs. Gonzalez*, 117 F. 2d 11, and "the exemptions must be strictly construed in order to secure * * * liberality of coverage."

On this basis of understanding the parties should be able to arrive at an agreement as to each employee without further trial.

Illustrations, which are merely indicative:

Timekeepers whose duties include keeping time for both covered and exempt workers are, in any work week in which their work is thus dual, covered for the entire week; the same is true of warehousemen and material clerks whose business it is to dispense or account for repair parts or materials and supplies to both exempt and covered workers; laborers who load stones on conveyances in the fields are covered by the law if such material is to be used for structural building or repair work other than the conservation of the fields or farm lands; likewise, machinists in the mill who at times perform work for use outside the mill are controlled by the work they perform in any work-week, and artisans, mechanics, and laborers

throughout the entire plantation organization are covered, unless in any workweek their employment is wholly and strictly within the exemption given to agriculture or processing as these operations are circumscribed by interpretations hereinabove, set forth.

If the parties are unable to adjust their differences and if further trial is desired on points that are considered to be in controversy, which are at issue [487] in the pleadings, and which are not dealt with herein, or, if either party desires further findings and shall present the same by Motion to the court within thirty days, the same will be given consideration and hearing at a time to be fixed by the court.

Dated at Honolulu, Hawaii, April 8, 1948.

/s/ D. E. METZGER,

Judge, U. S. District Court, District of Hawaii.

[Endorsed]: Filed April 8, 1948. [488]

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING ENTRY
OF FINAL JUDGMENT

Come Now the defendants above named by and through their attorney of record, Richard Gladstein, Esq., and move the above entitled court for an order directing entry of final judgment in the above entitled action, and present herewith a Judg-

ment for the approval of the above entitled court, and pray that the court make its order for the entry of said Judgment in the above entitled action.

Dated May 13, 1948.

/s/ RICHARD GLADSTEIN,
Attorney for Defendants.

Receipt of copies of the foregoing Motion, and of the Order and Judgment referred to herein, is hereby acknowledged, and the notice of time and place for the presentation of the foregoing Motion is hereby waived.

Dated May 13, 1948.

/s/ RUFUS G. POOLE,
Attorney for Plaintiff.

[Endorsed]: Filed May 22, 1948. [490]

[Title of District Court and Cause.]

ORDER DIRECTING ENTRY OF FINAL
JUDGMENT

The Court, having heard the parties, being fully advised, and good cause appearing therefor, pursuant to Rule 54(b), as amended, of the Federal Rules of Civil Procedure, hereby expressly directs the entry of final judgment in the form approved this day, on the issues raised by the Complaint herein, prior to the adjudication of the issues presented by Paragraph XI of defendants' Amended

Answer and Cross-Complaint (counterclaim) and plaintiff's Answer (reply) to said Cross-Complaint (counterclaim), which issues are referred to in the Order Granting Joint Motion for Separate Trial entered herein on March 22, 1948, and hereby expressly determines that there is no just reason for delay in the entry of the foregoing final judgment.

The judgment hereby directed to be entered is upon less than all of the claims presented in this action, to the extent that the claims presented by Paragraph XI of defendants' Amended Answer and Cross-Complaint (counterclaim) and plaintiff's Answer (reply) to said Cross-Complaint (counterclaim) are not [492] hereby adjudicated. The trial of said claims not herein adjudicated shall be held separately at a future date, and a separate judgment shall be rendered thereon. The judgment hereby ordered to be entered shall not terminate this action as to those claims which are hereinabove reserved for future trial.

Dated May 22, 1948.

/s/ DELBERT E. METZGER,

Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed May 22, 1948. [493]

In the United States District Court for the
Territory of Hawaii

Civil No. 787

WAIALUA AGRICULTURAL COMPANY,
LIMITED,

Plaintiff,

vs.

CIRACO MANEJA, et al.,

Defendants.

DECLARATORY JUDGMENT

The above cause having come on for hearing on September 18, 19, 22 and 23, 1947, the parties being represented in court by their respective counsel, and evidence, both oral and documentary, having been introduced, and the court, after the filing of briefs on behalf of the respective parties, having on April 8, 1948, rendered its "Findings With Conclusions" herein,

Now, Therefore, It Is Hereby Adjudged, Decreed and Declared as follows:

Part I.

Each and every activity described in the Complaint and the Stipulation of the Facts submitted by the parties and on file herein when performed by any defendant employee or by [495] any other employee of plaintiff similarly situated, constitutes an engagement in commerce or in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938

(hereinafter called the Act), and, by reason thereof all of the employee defendants, and those employees similarly situated, are "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in Sections 3(b) and 3(j) of the Act.

Part II.

The following described activities, and all other activities performed in the cane fields of the plaintiff which are of a similar character to those listed in this Part, when performed by any defendant employee or by any other employee of plaintiff similarly situated, come within the exemption from the provisions of Section 7(a) of the Act provided by Section 13(a)(6) thereof:

AGRICULTURAL ACTIVITIES

1. The preparation of plaintiff's cane fields for planting and the planting, ratooning, cultivating, weeding and fertilizing of such fields.
2. The spraying of plaintiff's cane fields with insecticides or herbicides.
3. The hauling of stones from plaintiff's cane fields except where the stones are to be used for structural or building purposes.
4. The spreading of irrigation water on plaintiff's cane fields and the operation of its irrigation controls.
5. The laying, moving or removing of plaintiff's field irrigation flume.
6. The patrolling of irrigation ditch lines, the

cleaning or weeding of irrigation reservoirs and irrigation [496] and drainage ditches and tunnels.

7. The grading of plaintiff's cane fields in connection with the irrigation and drainage thereof; and the filling of holes, gulches and ditches in such fields.

8. The harvesting on the plantation of plaintiff's sugar cane fields, including all activities and operations performed in such fields in connection with such harvesting operations, up to the point where the cane is severed from the ground and loaded into conveyances, except that where the cane is loaded into a rail car the exemption provided by Section 13(a)(6) of the Act shall continue until such car is hauled from the field and reaches the main line of plaintiff's railroad.

9. The picking up and reloading by field employees of plaintiff of cane stalks which fall from rail cars or trucks between plaintiff's fields and plaintiff's mill.

10. The performance of emergency repairs on plaintiff's agricultural equipment, implements or machinery in the fields, but this shall not include overhauling or general repair.

11. The keeping of time of plaintiff's field workers whose activities are exempt under Section 13 (a)(6) of the Act as herein set forth.

Part III.

Except as provided in Part IV hereof, the following described activities, and all other activities performed in and about plaintiff's mill building

which are of a similar character to those listed in this Part, when performed by any defendant employee or by any other employee of plaintiff similarly situated, come within the exemption from the provisions of [497] Section 7(a) of the Act provided by Section 7(c) thereof but not within the exemption provided by Section 13(a)(6) thereof:

SUGAR CANE PROCESSING ACTIVITIES

1. The drawing of the rail cars into the cleaning plant of plaintiff's mill, the uncoupling of such cars at the cane carrier, the weighing of the cane, and the unloading of such cane into the cane carrier and the removal of the empty cars from the cane cleaning plant to the mill yard, and all work performed in the cleaning plant in connection therewith.

2. The operation of any and all equipment, machinery and facilities in the cleaning and crushing of cane, clarifying and crystalizing of sugar juices, bagging of the raw sugar, removing it from the bagging and weighing machines in plaintiff's mill and the depositing of the raw sugar or molasses into adjacent warehouses, bins or tanks, or directly into trucks or rail cars for shipment, and the repairing, cleaning and otherwise maintaining of such equipment, machinery and facilities when performed in the mill building proper and while cane processing operations are actually being conducted or during breakdowns with the operating staff of plaintiff standing by waiting for the repairs to be completed. The exemption provided for in this

paragraph shall not apply at any time however to the operation, repairing, cleaning or maintaining of equipment, machinery and facilities used by the plaintiff in its mill to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity.

3. The erection of scaffolding in plaintiff's mill during breakdowns, with the operating staff of plaintiff standing [498] by waiting for repairs to be completed.

4. The performance of clerical work on the plantation in connection with plaintiff's cane processing activities where such work is performed in the mill building proper and during actual processing operations or during breakdowns with the operating staff standing by waiting for the repairs to be completed.

Part IV.

No activity is exempt by virtue of Section 7(c) if performed when the mechanical or manual processing operations of the plaintiff are actually suspended or discontinued for weekend cleaning or repairs or for plaintiff's off-season.

Part V.

All activities performed by any defendant employee or by any other employee of plaintiff similarly situated, other than those heretofore described in Part II and III of this Judgment, *supra*, are not within the exemption from the provisions of Section 7(a) of the Act provided by either Section 13(a)(6) or Section 7(c) thereof.

Part VI.

If any work week in which any defendant employee or any other employee similarly situated engages in an activity which is exempt from the provisions of Section 7(a) of the Act by virtue of either Section 13(a)(6) or Section 7(c) and also in an activity which is not so exempt, said employee is not exempt [499] for that work week from the provisions of Section 7(a) of the Act by virtue of either Section 13(a)(6) or Section 7(c).

Part VII.

In any work week in which any defendant employee or any other employee similarly situated engages in activities, some of which are exempt from the provisions of Section 7(a) of the Act by virtue of Section 13(a)(6) and the remainder of which are so exempt by virtue of Section 7(c), said employee is exempt for that work week from the provisions of Section 7(a) of the Act.

Dated May 22, 1948.

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court for the District
of Hawaii.

The Court hereby approves the form of the foregoing final judgment and directs that it be entered

/s/ DELBERT E. METZGER,
Judge, United States District Court for the Dis-
trict of Hawaii.

[Endorsed]: Filed May 22, 1948. [500]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Waialua Agricultural Company, Ltd., plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from Parts I, III, IV, V and VI of the final judgment entered in this action on May 22, 1948.

Dated Honolulu, T. H., May 24th, 1948.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 24, 1948. [502]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by the attorneys for the parties hereto that the following shall constitute the transcript of record on appeal:

1. Complaint, together with attached Exhibits A, B, C, D, E, F, G, H and I—filed April 9, 1947.

2. Amendment of Complaint—filed July 18, 1947.

3. Answer to Complaint—filed September 12, 1937 at 3 o'clock and 50 minutes.

4. Stipulation of Facts—filed September 12, 1947 at 3 o'clock and 55 minutes. (As Exhibits A, B, C, D, E, F, G, H and I attached to Stipulation of Facts are identical to similarly lettered exhibits

attached to Complaint and hereinabove designated, they shall be omitted from the copy of said Stipulation of Facts.)

5. Copy of Transcript of Proceedings in subject case held in above named Court on September 18, 19, 22 and 23, 1947, filed with the District Court herewith, and defendants' Exhibits numbered 1, 2, 3 and 4, respectively, introduced in evidence in such proceedings. [504]

6. Amended Answer and Cross-Complaint [Counterclaim]—filed November 3, 1947.

7. Answer [Reply] to Cross-Complaint [Counterclaim]—filed November 19, 1947.

8. Joint Motion for Separate Trial pursuant to Rule 42(b) of issues raised by defendants' Amended Answer and Cross-Complaint [Counterclaim] and plaintiff's Answer [Reply] thereto—filed March 22, 1948.

9. Order Granting Joint Motion for Separate Trial—March 22, 1948.

10. Findings with Conclusions of District Court—filed April 8, 1948.

11. Motion Requesting Order Directing Entry of Final Judgment—filed May 22, 1948.

12. Order Directing Entry of Final Judgment—filed May 22, 1948.

13. Judgment of District Court—filed May 22, 1948.

14. Notice of Appeal by Plaintiff—filed May 24, 1948.

15. Notice of Cross-Appeal by Defendants—filed May 25, 1948.

16. This Stipulation as to Record on Appeal—filed May 25, 1948.

Dated: Honolulu, T. H., 25th day of May, 1948.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

Attorneys for Plaintiff.

/s/ RICHARD GLADSTEIN,

Attorney for Defendants.

[Endorsed]: Filed May 25, 1948. [505]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL TO CIRCUIT
COURT OF APPEALS FROM PART OF
JUDGMENT

Please take notice that the defendants above named hereby cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from the following portions only of the judgment entered in the above entitled action on May 22, 1948:

1. From so much of Part II thereof as grants to plaintiff an exemption from Section 7 (a) of the Fair Labor Standards Act in respect of certain activities which are not performed directly, proximately and immediately in and upon the actual production of sugar cane.

2. From so much thereof as grants to plaintiff an exemption from Section 7 (a) of the said Act

in respect of certain activities which are not performed directly, proximately and immediately in and upon the transforming of sugar cane into unrefined sugar.

Dated: Honolulu, T. H., May 25, 1948.

/s/ RICHARD GLADSTEIN,
Attorney for defendants.

[Endorsed]: Filed May 25, 1948. [507]

[Title of District Court and Cause.]

AMENDMENT TO AND CORRECTION OF
NOTICE OF CROSS-APPEAL, AND
AMENDED NOTICE OF
CROSS-APPEAL

Notice is hereby given that, through inadvertence and mistake, the notice of cross-appeal heretofore filed herein did omit, from paragraph numbered 2, the phrase "of Part III," which phrase should appear immediately after the words "From so much."

Notice is further hereby given that the defendants do hereby amend and correct the said notice of cross-appeal by inserting the said omitted phrase at the place indicated as above. As so amended and corrected, the said Notice shall read as follows:

The defendants cross-appeal to the Circuit Court for the Ninth Circuit from the following portions only of the judgment entered in the above entitled action on May 22, 1948:

1. From so much of Part II thereof as grants to plaintiff an exemption from Section 7 (a) of the [512] Fair Labor Standards Act in respect of certain activities which are not performed directly, proximately and immediately in and upon the actual production of sugar cane.

2. From so much of Part III thereof as grants to plaintiff an exemption from Section 7 (a) of the said Act in respect of certain activities which are not performed directly, proximately and immediately in and upon the transforming of sugar cane into unrefined sugar.

Dated: Honolulu, T. H., May 26, 1948.

/s/ RICHARD GLADSTEIN,
Attorney for Defendants.

[Endorsed]: Filed May 26, 1948. [513]

[Title of District Court and Cause.]

STIPULATION TO ENLARGE RECORD ON
APPEAL

It is hereby stipulated by the attorneys for the parties hereto that the following documents shall be added and become a part of the transcript of record on appeal herein:

1. Amendment To and Correction of Notice of Cross-Appeal, and Amended Notice of Cross-Appeal—filed May 26, 1948.

2. Stipulation to Enlarge Record on Appeal—
filed May 26, 1948.

Dated: Honolulu, T. H., this 26th day of May,
1948.

/s/ RUFUS G. POOLE,

/s/ E. C. MOORE,

Attorneys for Plaintiff.

/s/ RICHARD GLADSTEIN,

Attorney for Defendants.

[Endorsed]: Filed May 26, 1948. [515]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify the foregoing pages numbered 1 to 519 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that the costs of the foregoing transcript of record are \$31.70 and that said amount has been paid to me by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of June, 1948.

(Seal) /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: No. 11952. United States Circuit Court of Appeals for the Ninth Circuit. Waialua Agricultural Company, Limited, a corporation, Appellant, vs. Ciraco Maneja, et al., Appellees. Ciraco Maneja, et al., Appellants, vs. Waialua Agricultural Company, Limited, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed June 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11952

WAIALUA AGRICULTURAL COMPANY,
LIMITED,

Appellant,

v.

CIRACO MANEJA, et al.,

Appellees;

and

CIRACO MANEJA, et al.,

Appellants,

v.

WAIALUA AGRICULTURAL COMPANY,
LIMITED,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The appellant, Waialua Agricultural Company, Limited, intends to rely upon the following points in its appeal from the judgment of the United States District Court for the District of Hawaii entered in this action on May 22, 1948:

I.

The District Court erred in holding or failing to hold as follows:

1. In holding that each and every defendant employee and any other employee of plaintiff similarly situated are "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in Sections 3(b) and 3(j) of the Fair Labor Standards Act of 1938 (hereinafter called the "Act"), when they are employed in the following activities:

(a) The building, repair and maintenance in plaintiff's plantation villages, of dwelling houses, and of all facilities, equipment and installations therein;

(b) The repair and maintenance of recreational buildings, structures and athletic fields in the plantation villages and of the various facilities, equipment and installations therein;

(c) The repair, maintenance and cleaning of streets, roads, yards and other areas located in and about plaintiff's plantation villages, including the pruning of shade trees;

(d) The operation, repair and maintenance of

sewage and sanitation facilities in and for plantation villages;

(e) The furnishing of water to the residents of plaintiff's plantation villages and the repair and maintenance of all equipment and facilities used therefor;

(f) The cutting of firewood from wooded areas on plaintiff's plantation to supply fuel to plaintiff's employees living on the plantation;

(g) The keeping of records of the construction and repair work performed on plaintiff's plantation dwelling houses and recreational buildings and grounds;

(h) The performance of any work similar to that listed in (a) to (g) supra;

2. In failing to hold that each and every defendant employee and any other employee of plaintiff similarly situated come within the exemption from the provisions of Section 7(a) of the Act provided by the agricultural exemption contained in Section 13(a)(6) thereof, when they are employed in any activity described in the Complaint and the Stipulation of the Facts submitted by the parties;

3. In failing to hold that each and every defendant employee and any other employee of plaintiff similarly situated come within the exemption from the provisions of Section 7(a) of the Act provided by Section 7(c) thereof, when they are employed in any activity connected with the transporting of sugar cane from the fields to the mill, processing sugar cane into raw sugar including the temporary storage and shipment of raw sugar, and their neces

sary and related operations including activities performed by the service shops personnel and the operation, repairing, cleaning or maintaining of equipment, machinery and facilities used by the plaintiff in its mill to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity;

4. In holding that each and every defendant employee and any other employee of plaintiff similarly situated are not exempt by virtue of Section 7(c) if they perform their activities when the mechanical or manual processing operations of the plaintiff are suspended or discontinued for weekend cleaning or repairs or for plaintiff's off-season;

5. In failing to hold that each and every defendant employee and any other employee of plaintiff similarly situated are within the exemption from the provisions of Section 7(a) of the Act provided by either Section 13(a)(6) or Section 7(c) thereof, when they are employed in one or more of the activities described in the Complaint and the Stipulation of the Facts submitted by the parties;

6. In failing to hold that in any workweek in which any defendant employee or any other employee similarly situated engages in an activity which is exempt from the provisions of Section 7(a) of the Act by virtue of either Section 13(a)(6) or Section 7(c) and does not engage for any substantial part of his time during that workweek in an activity which is not so exempt, said employee is exempt for that workweek from the provisions of Section 7(a) of the Act by virtue of Section 13(a)(6) or Section 7(c).

II.

The District Court erred in admitting, relying upon, and crediting:

(a) the testimony of the defendants' witness Hall, which was incompetent, irrelevant and immaterial, constituted hearsay, and was lacking in credibility;

(b) defendants' exhibit number 4, which was incompetent, irrelevant and immaterial, and was lacking in credibility.

III.

The District Court erred in making findings of fact which are in conflict with the Stipulation of the Facts submitted by the parties and are not supported by the evidence, oral or documentary, introduced at the trial in the District Court. Said erroneous findings include, but are not limited to, the following:

(a) Finding that plaintiff conducts factory operations;

(b) Finding that the activities performed in the carrying on of plaintiff's business include railroad building;

(c) Finding that the main managerial business of the plaintiff is conducted through a "plantation agency house in Honolulu where most of its officers and directors are centered";

(d) Finding that the cane harvested on plaintiff's cane fields is assembled at centralized points ready for transportation;

(e) Finding that plaintiff generates some electricity in a separate building from its mill building;

(f) Finding that plaintiff sells small surplus amounts of electric power to a public utility company;

(g) Finding that a president of the Hawaiian Sugar Planters Association made the statement a few years ago that "As has been emphasized again and again, the primary function of our plantation is not to produce sugar, but to pay dividends";

(h) Finding that "Railroad operation is a systematic business calling for the employment of skilled, experienced men, trained to quick, keen perception (not farmhands or millhands) for handling locomotives and moving cars (not the goods in transit) and for the maintenance of roadbed, track and structures, and roundhouse care and servicing of locomotives—all specialized technical work. It is as different from farming or processing operations as day is to night";

(i) Finding that Section 7(c) of the Act exempts the "first" processing of sugar cane from the maximum hours provisions of the Act.

Dated: Washington, D. C., 14th day of June, 1948.

/s/ RUFUS G. POOLE,

Attorney for Appellant Waialua Agricultural Company, Limited.

(Verified.)

[Endorsed]: Filed June 18, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL BY CROSS-
APPELLANTS

The Cross-Appellants herein intend to rely upon the following points in their cross-appeal from the judgment of the United States District Court for the District of Hawaii entered in this action on May 22, 1948:

I.

The District Court erred in holding that Appellant is entitled, pursuant to Section 13(a)(6) of the Fair Labor Standards Act, to exemption from Section 7(a) of said Act in respect of certain activities performed in or about the cane fields of Appellant, which are not performed directly, proximately and immediately in and upon the actual production of sugar cane.

II.

The District Court erred in holding that Appellant is entitled, pursuant to Section 7(c) of the Fair Labor Standards Act, to exemption from Section 7(a) of the said Act in respect of certain activities performed in or about the mill building of Appellant, which are not performed directly, proximately

and immediately in and upon the transforming of sugar cane into unrefined sugar.

Dated this 25th day of June, 1948, at San Francisco, California.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ By RICHARD GLADSTEIN,
Attorneys for Cross-Appellants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed June 28, 1948. Paul P. O'Brien, Clerk.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLANT.

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FILED

SEP 30 1948

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 11952

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellee.

An Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLANT.

This action was brought by Waialua Agricultural Company, Limited (hereinafter referred to as the appellant) as a class action under Rule 23(a) of the Federal Rules of Civil Procedure. The suit was instituted pursuant to Sec. 74d of the Judicial Code, 28 U. S. C. § 2201 (formerly § 400), to secure a declaratory judgment (R. 3, 410-411). The appellees, Ciraco Maneja et al. (who have also appealed from the Judgment below), are (a) employees of appellant, (b) Local 145-7 of the International Longshoremen's and Ware-

housemen's Union, which is the collective bargaining representative of such employees and of all other employees of appellant engaged in performing similar work and (c) Jack Hall, Regional Director of the International Longshoremen's and Warehousemen's Union (R. 3-4). The court was requested to declare the rights of the parties in a controversy relating to the judicial construction of Secs. 3(b), 3(f), 3(j), 7(a), 7(c) and 13(a) (6) of the Fair Labor Standards Act of 1938 (The Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. Secs. 201 *et seq.*) hereinafter called "the Act" (R. 3, 4-5, 7-9).

JURISDICTION

Jurisdiction was conferred upon the District Court by Sec. 24 of the Judicial Code as amended, 28 U. S. C. § 1337 (formerly § 41(8)) and by Sec. 274d of the Judicial Code, 28 U. S. C. § 2201 (formerly § 400) (R. 3, 411). The nature of the controversy between the parties and the necessity for relief of declaratory judgment herein were fully explained in paragraphs 5-9 inclusive of the Complaint (R. 4-9).¹ The Findings with Conclusions (R. 410-437) of the District Court are reported at 77 F. Supp. 480. The Judgment of the District Court (R. 440-445) is not reported. This court has jurisdiction to review the judgment below under Secs. 116 and 128 of the Judicial Code, as amended, 28 U. S. C. §§ 41, 1291, 1294 (formerly §§ 211, 225).

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Labor Standards Act involved are Sections 3(b), 3(f), 3(j), 7(a), 7(c), and 13 (a)(6). These will be set forth in full or in relevant part in appropriate places in the Argument, *infra*.

¹ A class action for declaratory judgment is appropriate in controversies between employers and employees pertaining to the proper construction of the Fair Labor Standards Act. *Tennessee Coal, Iron and Railroad Company v. Muscoda*, 321 U. S. 590 *reh'g. den.* 322 U. S. 771; *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, *reh'g. den.* 325 U. S. 897; *Bowie v. Gonzalez*, 117 F(2d) 11 (C. C. A. 1).

STATEMENT OF THE CASE

The facts in this case are undisputed. They are set forth in a Stipulation of Facts (R. 129-256) (hereinafter called the Stipulation) which is an extremely vital part of the Record and contains all the facts pertinent to a determination of the issues involved in the case. Briefly summarized, these facts are:

*Appellant operates a sugar plantation*², located in the County of Honolulu, Island of Oahu, Territory of Hawaii. Since the incorporation of appellant in 1898, it has been engaged almost exclusively in the growing, cultivating and harvesting of sugar cane on land owned or leased by it (R. 131, 411-412), and the processing of such sugar cane into raw sugar and molasses on the plantation where produced (R. 65, 130, 131, 138-139, 256). The appellant processes no cane except that grown by itself on its plantation (R. 184), nor does it engage in any sugar refining operations (R. 132). During 1945, the appellant produced 56,193 tons of raw sugar (R. 132, 411). Substantially all of the land (9,663 acres) now devoted to sugar cane production has been owned or leased and used by appellant for this purpose since 1910 (R. 133, 411).

On its plantation appellant prepares and plows the fields for the planting of sugar cane; plants sugar cane; "ratoons" the fields³; cultivates sugar cane; applies fertilizer to cane fields; irrigates cane fields by a network of irrigation ditches and water storage reservoirs; harvests sugar cane; maintains a network of field roads for the

² The parties have stipulated that the term "plantation" means the geographical area on which the appellant produces sugar cane, processes it into raw sugar, and conducts related operations (R. 65, 130, 256).

³ "Ratooning" is a term referring to the operations performed after a field is harvested to prepare the field for the growing of another crop. In such preparation the old cane stools or stubble are left in place and the ground is refurrowed into rows. The undamaged cane stools or stubble will then send up new shoots upon application of water and fertilizer to the field. New seed is added to fill in blank spots or to replace damaged stools or stubble (R. 142-143).

transportation of labor, field supplies, and equipment throughout the plantation; and transports sugar cane by a narrow-gauge railroad from the fields where grown to the mill.⁴ At the mill the appellant grinds the sugar cane into raw sugar and molasses and loads bagged raw sugar and molasses for shipment to the continental United States, or stores such products temporarily in the sugar warehouse or molasses tanks (R. 139-183, 412). The loading of the bagged raw sugar and of the molasses into railroad box and tank cars of the Oahu Railway and Land Company, an independently owned and operated carrier, at the site of the mill and the pushing of the cars from such site onto a nearby spur of such carrier complete the operations of the appellant and the work of its employees relative thereto (R. 131-132).⁵

Sugar cane cultivation and processing are physically and functionally integrated. Sugar cane is highly perishable and starts to deteriorate immediately after harvesting. To avoid serious losses it must be processed into sugar, syrup or molasses within a few hours after being harvested. For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown (R. 133). Substantially all the cane growing land of the appellant, its buildings and yard area, and other lands owned or leased by the appellant, but unsuited for cane growing, including a wooded area from which fire wood is cut for use as fuel by the appellant's employees living in the

⁴ The parties have stipulated that the term "mill" means the building and equipment of the appellant used in the actual processing of sugar cane into raw sugar, including cane carrier, cane cleaning plant and scales, crushing plant, boiling house, fire room, power plant, sugar warehouse, and molasses tanks, and all equipment therein (R. 131).

⁵ The Oahu Railway and Land Company discontinued its operations in 1947 after the conclusion of the trial below. Such railroad had previously been used not only to carry the appellant's bagged raw sugar and molasses but also to deliver incoming plantation supplies and equipment. The outgoing and incoming freight of the appellant's plantation are now handled by an independently owned and operated trucking company (R. 159).

plantation villages hereinafter described, form a contiguous and compact area (R. 134), as shown on Exhibit A of the Stipulation (R. 65, 256).

All the lands devoted to the growing of sugar cane are managed and operated by the appellant as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being plowed and furrowed for new planting, some is being "ratooned", some acreage is in young growth, some in old growth nearing maturity and other acreage is being harvested. The growing, harvesting and processing of the cane and the marketing of the raw sugar constitute one continuous and year around operation, except that annually, harvesting and processing of cane are suspended for approximately 3 months solely for the purpose of reconditioning the mill and equipment (R. 135-136, 210, 413).

Hauling on Plantation. Cane-growing land is criss-crossed with a network of plantation field roads and a narrow gauge railroad owned by the appellant (R. 135). Most of the field roads are dirt surface and are maintained by the appellant. Appellant operates trucks and trailers on these roads to haul laborers and agricultural supplies and equipment used for planting, cultivating and harvesting to and from the fields. When there is a shortage of supplies or equipment at the plantation, appellant's trucks may go to Honolulu or elsewhere on Oahu to obtain them (R. 164-166).

In the harvesting operation, cane loading machines grab the standing or growing cane and load it onto rail cars located on portable tracks temporarily laid in the cane fields (R. 154, 155-156, 160, 361). The cars are then hauled or pushed by tractors to "main line" or permanent narrow gauge trackage at the edge of the fields and

hauled thereon by locomotives to the processing mill in one continuous journey (R. 157, 160, 161). On return from the mill, empty cars are moved to some point near the harvesting operations (R. 161) or else they are removed from the mill yard to nearby spurs (R. 234). The narrow gauge "main line" is used to a minor extent to transport some agricultural supplies and harvesting equipment between the plantation buildings and yard area and the fields (R. 159).

The narrow gauge railroad has been owned and operated by appellant since its organization in 1898. It is constructed, located and operated exclusively on the plantation. It hauls no cane or freight for anyone other than the appellant (R. 158-159). Cars used on this narrow-gauge railroad carry an average load of 4 and $\frac{3}{4}$ tons per car gross cane (R. 157).

Steam and electric power. The extraction of the juices from the sugar cane fibre and the processing of such juices into raw sugar require large amounts of power. It is therefore traditional in sugar cane processing to utilize bagasse (the cane fibre remaining after the juices are extracted from the cane stalks) as an economical source of fuel for the production of power for use in performing the various processing operations. Bagasse produced by the appellant has no marketable value. The room in which the bagasse is burned and the steam is produced is known as the fire room and is located in the mill (R. 186, 187).

The bagasse is used to produce steam, which in turn is used (a) to drive the mill engines and cane processing equipment, (b) to heat and evaporate the sugar juices and crystallize the raw sugar, and (c) to generate electric power needed in the various operations of the plantation (R. 186, 188, 189). The steam used for this latter purpose, after passing through the generating machinery, is conveyed through steam lines for further use in the processing operations of the mill (R. 188-189, 190-191).

Electric power generated by the plantation is not sufficient to supply its needs. More than a third of the power which it uses is purchased from the Hawaiian Electric

Company, Ltd., an independently owned and operated public utility on the island of Oahu (R. 191).

The power generated and purchased by the appellant is distributed to its various operations on the plantation and also to several small non-plantation users living in the plantation community (R. 191-192).

The total amount of power used by all non-plantation users is approximately one-half of one percent of the total power distributed by the appellant and is gradually becoming even less. None of the electric power distributed by the appellant to non-plantation users is used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce, nor is it transmitted into interstate commerce (R. 192-193).

During the off-season, described hereinafter p. 8, when the steam and electric power equipment in the mill are overhauled, the appellant generates no electric power but purchases all the power it needs from the Hawaiian Electric Company (R. 194).

Service shops. Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and major overhaul. A group of small repair shops are therefore located in an area extending not more than 300 feet from the mill building (R. 114, 194-195, 256).

Concrete products. The appellant makes irrigation flumes, water supply pipe, and a few other concrete products in a small building, which is located on plantation lands adjacent to the plantation buildings and yard area. Such products are all used on the plantation in connection with its operations (R. 114, 206-207, 256).

Storage of supplies and materials for appellant's operations takes place in several buildings located in the plantation buildings and yard area (R. 207).

Work schedule of mill employees. Production in the mill operations of appellant is keyed basically to a six-day week with continuous and around-the-clock operations, the mill stopping the grinding of cane at 2:00 p. m. on

Saturdays and starting up at 2:00 p. m. on Sundays. The 24-hour day is divided into three 8-hour shifts (R. 183, 413).

Week-end repair of mill. The weekly 24-hour shutdown period of the mill is necessary to perform cleaning and repair operations. While, in general, repairs are performed during the week-end, every effort is made to anticipate week-end requirements and the various service shops located near the mill perform as much work as possible while the mill is in operation (R. 183, 184). Sugar remains in process during the week-end (R. 338, 357, 434).

Off-season activities. Because of the slight variation in climatic and weather conditions from month to month, *sugar cane is grown the year around in the Territory and can be harvested and milled any month in the year—and frequently is.* Solely for efficiency of operations, sugar mills of the Territory must be closed down annually for extensive and general repair and reconditioning because of the heavy wear and tear on mill machinery and equipment. That part of the year when the mill is shut down for repairs is termed the "off-season". If these repairs were not done annually, operating shutdowns would be frequent and excessive losses would be incurred. The appellant's off-season averages three months per year. During the off-season there are no harvesting, ratooning, cane transportation or cane processing operations. All field operations other than harvesting, ratooning and cane transportation continue throughout the year (R. 210, 212, 213, 413).

Most of the off-season repair work is done by the men who operate the mill during the grinding season. *Just as many man-days of work are performed daily in the mill during the off-season as during the grinding season.* All mill employees are employed on a forty-eight hour work-week both during the grinding season and the off-season (R. 213, 214-215).

Plantation Villages. At the present time appellant owns 820 dwelling houses, all of which are located on the plantation. Most of them surround the plantation buildings and

ward areas. Approximately 335 houses, however, are scattered over the plantation, some of this latter number being clustered and forming field villages (R. 221).

At the time the appellant company was organized, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane. Consequently, it became necessary for the appellant over a period of years to construct houses, develop services and otherwise establish facilities for permanent living on the plantation to serve the needs of the required number of employees and their families (R. 219). The principal plantation community was established around the plantation buildings and yard area and came to be known as the village of Waialua (R. 65, 220, 256).

Waialua village has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and also roads constructed and maintained by the appellant. This plantation community contains the usual services and typical commercial establishments to be found in any small town or village, including stores, a bank, motion picture theatres and other service establishments, which are owned and operated by independent businesses. The appellant also owns and operates for its employees and the general public a store, an automotive service station and a hospital. A United States post office, public library, churches, and schools operated as a part of the Territorial School System are also located in this plantation area. There are also two gymnasiums, a club house, a swimming pool, tennis courts, an athletic field and a beach house, all of which were constructed by the appellant and are used by an Athletic Association, the membership of which is composed of both appellant's employees and other persons in the general community, which operates these facilities through dues collections (R. 220, 222-223).

The 820 dwelling houses on the plantation are occupied by 3,373 persons, of whom 2,952 are employees and pen-

sioners of the appellant, and their families. The remaining 420 persons living in such houses are lessees and their families who are not employed by the appellant and who either work off the plantation or who own, operate or are employed by independently controlled businesses within it (R. 222). The occupants of the houses are provided not only with housing and housing maintenance but also, if they so desire, with water, firewood and fuel, electricity, medical care, recreational facilities and various maintenance services including garbage disposal and street cleaning (R. 219-220).

No employee covered by the appellant's existing collective bargaining agreement, including each and every employee appellee herein, is required as a condition of employment to live on the plantation or in plantation houses or to use any service or facility which the appellant may be in a position to render its employees (R. 221). Some employees of appellant live off the plantation and in houses not owned or supplied by appellant (R. 222). The relationship which exists between the appellant and its employees who live in plantation houses is that of landlord and tenant; employees pay cash to the appellant for all facilities and other services furnished them. Employees of the appellant render services and perform maintenance work on plantation houses and village areas (R. 220-221).

After the plantation was established and continued to operate there gradually grew up an independent community now known as the village of Haleiwa, which is located off the edge of the plantation, a little more than a mile from the village of Waialua (R. 220). This village is a small business and residential community made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to appellant's employees and to surrounding community residents, who include persons working at other locations on the Island of Oahu, residents of numerous beach houses and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated

with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities (R. 223).

Duties of employee appellees. Each of the employee appellees is engaged in performing some of the operations of appellant which are described above (R. 224-225). A detailed description of the work and duties of each such employee appellee will be found in paragraphs 39-86 of the Stipulation (R. 225-255) and will be more fully discussed in the Argument, *infra*, pp. 17-21, 52, 71-72. As already noted, however, the work and duties of each employee appellee are performed in connection with and as a part of the plantation operations described in full in the Stipulation, and the work and duties of each employee appellee must be considered as further described by such description of the plantation operations to the extent that such description is related and applicable to the particular work and duties described for the several employee appellees (R. 224-225).

Findings with Conclusions and Judgment of the District Court

The District Court entered general Findings with Conclusions (R. 410-437) which did not indicate precisely what the Court's holdings were with respect to many of the activities performed by the employee appellees and other employees of appellant similarly situated. Counsel for the parties therefore agreed upon and presented to the court a form of judgment containing detailed findings as to the many various activities conducted by said employees. The court, however, insisted that the judgment be abbreviated and thereafter entered the Judgment (R. 440-445) appealed from.

The District Court held that all the employee appellees and all other employees of appellant similarly situated, including the employees repairing and maintaining the plantation houses and related domestic facilities, are engaged in commerce or the production of goods for commerce (R. 440-441). With respect to the agricultural ex-

emption from the overtime provisions of the Act provided by Sec. 13(a)(6), the court in general denied its applicability except to certain specified work performed in the fields (R. 441-442). As for the processing exemption from the overtime provisions of the Act provided by Sec. 7(c), the court confined said exemption to certain specified activities performed in the appellant's mill building and even then allowed the exemption only while cane processing operations were actually being conducted or during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed (R. 442-444). Weekend cleaning or repairs at the mill and work at the mill during the off-season were held non-exempt under Sec. 7(c) (R. 444). Employees engaged in all truck and railroad hauling on the plantation (except portable track hauling) were held non-exempt under both Sec. 13(a)(6) and Sec. 7(c) (R. 424-425, 426, 427, 428, 430-431, 444).⁶

The court further held that if in any workweek an employee appellee or any other employee of appellant similarly situated performs some work which is exempt from the overtime provisions of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c) and other work which is not so exempt, such employee is for that workweek not exempt from the over-

⁶ To understand the holdings of the court, its Judgment must be read together with its findings with conclusions. While the Judgment specifically lists the activities that are held exempt under Sec. 13(a)(6) or Sec. 7(c), it does not list the activities held non-exempt. The judgment initially presented to the court by counsel for the parties and which the court refused to enter did specifically list all the activities involved in the case which are non-exempt under the court's decision. The court's refusal to enter the judgment enumerating all such activities was not based upon its disagreement therewith, but simply upon the ground that the detailed enumeration was unnecessary and that it was sufficient merely to state in Part V of the Judgment (R. 444) that all activities other than those listed as exempt under Sec. 13(a)(6) or Sec. 7(c) are non-exempt. In order, however, for this court clearly to comprehend the issues in this case, it is of paramount importance that it know precisely what the activities are which were held non-exempt. In our Argument *infra*, we shall explain in detail what such various activities are.

time provisions of the Act under either Sec. 13(a)(6) or Sec. 7(c) (R. 445).

Finally, the court held that if in any workweek an employee appellee or any other employee of appellant similarly situated performs activities, some of which are exempt under Sec. 13(a)(6) and the remainder of which are exempt under Sec. 7(c), such employee is exempt for that workweek from the overtime provisions of the Act (R. 445).

QUESTIONS PRESENTED

1. Are the employee appellees, as well as all other employees of appellant similarly situated, "employed in agriculture" as the term "agriculture" is defined in Sec. 3(f) of the Act and therefore exempt from the overtime provisions of the Act as provided by Sec. 13(a)(6) thereof?

2. Assuming, but not admitting, that any of said employees is not so exempt by virtue of Sec. 13(a)(6), is he exempt from the overtime provisions of the Act throughout the year, or any part thereof, by virtue of Sec. 7 (c) of the Act which provides that "in the case of an employer engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup," the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged"?

3. If during the same workweek an employee appellee or any other employee of appellant similarly situated engages in an activity exempt under Sec. 13(a)(6) or Sec. 7(c) of the Act and does not engage for any substantial part of his time during such workweek in an activity not so exempt, is he exempt for that workweek from the overtime provisions of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c)?

4. Are the employee appellees, when they are repairing and maintaining plantation dwelling houses and related domestic facilities, and all other employees of the appellant, when they are performing similar work, "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in Secs. 3(b) and 3(j) of the Act?

SPECIFICATION OF ERRORS

The District Court erred as follows:

1. In holding that each and every employee appellee and any other employee of appellant similarly situated are "engaged in commerce or in the production of goods for commerce", as the terms "commerce" and "produced" are defined in Secs. 3(b) and 3(j) of the Act, when they are employed in building, repairing and maintaining dwelling houses and related domestic facilities in appellant's plantation villages or in performing similar work.

2. In failing to hold the exemption provided by Sec. 13 (a)(6) of the Act applicable to each and every activity described in the Complaint and Stipulation.

3. In failing to hold that the exemption provided by Sec. 7(c) applies to any activity connected with the transporting of sugar cane from the fields to the mill, processing sugar cane into raw sugar including the temporary storage and shipment of raw sugar, and their necessary and related operations including (a) activities performed by the service shops personnel, (b) the operation, maintenance and repair of equipment, machinery and facilities used by the appellant in its mill on the plantation to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity, and (c) the cleaning or repair of the appellant's mill and equipment therein on the plantation during weekends or the off-season when the processing operations of appellant are suspended or discontinued.

4. In failing to hold that in any workweek in which any employee appellee or any other employee of appellant similarly situated engages in an activity which is exempt from the provisions of Sec. 7(a) of the Act by virtue of either Sec. 13(a)(6) or Sec. 7(c) and does not engage for any substantial part of his time during that workweek in an activity which is not so exempt, said employee is exempt for that workweek from the provisions of Sec. 7(a) of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c).

ARGUMENT

I.

ALL OF THE EMPLOYEE APPELLEES ARE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SEC. 3(f) AND THEREFORE ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT AS PROVIDED BY SEC. 13(a)(6).⁷

A. MECHANIZATION OF AGRICULTURAL OPERATIONS IS IMMATERIAL.

Sec. 13(a)(6) of the Act exempts from both the wage and hour provisions thereof "any employee employed in agriculture". Sec. 3(f) defines the term "agriculture" as follows:

" 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

To be exempt, an employee must simply be employed in one or another of the activities or practices referred to in the statutory definition. "Employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 612.

⁷ Sec. 13(a)(6) also grants exemption from the wage provisions of the Act. This is immaterial in this case since appellant's lowest paid employee receives an hourly rate substantially in excess of that required by the Act (R. 255). The hourly wage rates of appellant's rank-and-file employees range from a minimum of 80 cents (twice the minimum wage established by the Act) to a maximum of \$1.38 (R. 136).

Although the Act in its general purposes is remedial in character, it is equally remedial in its specific purpose of according broad agricultural exemptions "and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities". *McComb v. Hunt Foods, Inc.*, 167 F. (2d) 905, 908 (C. C. A. 9). As clearly appears from the broad wording of the exemption as well as from the legislative history of the exemption, the purpose and intent of Congress was to free agriculture of the cost and other obligations imposed upon industry.

The court below nevertheless appears to have predicated its entire decision on the view that appellant's operations are integrated, mechanized and "industrialized" (R. 420-428). That factor is wholly immaterial. The agricultural operations here involved are exempt under the statutory intent and language. Appellant's field operations are no less mechanized than its processing or transportation operations (R. 156-157, 216). To accept fully the District Court's viewpoint would lead to the absurdity of not exempting such obvious agricultural operations as plowing, weeding, irrigating or harvesting, all commonly done by mechanized equipment.

In *Damutz v. Pinchbeck*, 158 F. (2d) 882, the Second Circuit held exempt under Sec. 13(a)(6) a fireman employed in a greenhouse, notwithstanding that it considered his conditions of employment to be more nearly like those of a factory worker than those of a worker on the ordinary farm. Emphasizing that his work came within the exemption language, the court said (158 F. (2d at p. 883):

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Differing definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one".

See too *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 614, where the court discussing the agricultural processing exemption granted by Section 13(a)(10), stated that when Congress desired to make exemptions in the Act depend upon size and quantity, it used appropriate language to refer to size and quantity specifically. Cf. also the Hawaii Wage and Hour law, which exempts employees in "agriculture" (such term being defined precisely as in the Federal Act) only if the employer employs less than 20 persons. Revised Laws of Hawaii, 1935, chapter 259-c, Title XXVI, as amended, Sec. 2(e)(2).

The court will take judicial notice of the extraordinary technological advances in American agriculture in the generation preceding enactment of the Act.⁸ Congress legislated with full knowledge of these facts, and has since declined to deny exemption to so-called "mechanized" or "industrialized" agriculture, notwithstanding arguments presented in behalf of Hawaiian plantation employees by the very union here involved. *Infra*, p. 40.

B. DESCRIPTION OF OPERATIONS HELD NON-EXEMPT.⁹

The District Court evidently believed, as appears from its findings with conclusions and judgment, that in order to qualify for the agricultural exemption, an employee must work not only on the appellant's farm but in the cane-growing fields themselves (R. 424-425, 428, 441-442). But as will appear below, not even all work done in the fields was held exempt. A description of the operations held non-exempt under Section 13(a)(6) follows:

1. *Hauling by narrow gauge railroad* of sugar cane from the appellant's fields to its mill is part of the continuous

⁸ *U. S. Census of Agriculture* (1945) pt. II, p. 65. Farms or plantations the size of appellant's are not at all rare in the United States and its Territories and possessions; the last census of agriculture disclosed more than 7100 farms with 10,000 acres or more. *Id.* See also Supp. Rep. 1012, pt. 2, Committee on Education and Labor, 79th Cong., 1st Sess., p. 77.

⁹ Among such operations are the building, repairing, and maintaining of dwelling houses and related domestic facilities in the appellant's plantation villages. These will be considered *infra*, pp. 77-78.

integrated operations on the plantation. *Supra*, pp. 5-6.

Employees engaged in this operation move the trains to and from the mill, maintain and repair the main line trackage, install field switches for connecting main lines of the railroad to field portable track lines, pick up cane spilled along the rights of way, maintain, service and repair the locomotives and cane cars, protect the public at road crossings, dry and maintain a supply of sand for use by locomotives, clean, weed, maintain and repair railroad track beds and perform other duties in connection with railroad hauling on the plantation (e.g. R. 157-158, 160-161, 162-163, 195, 196, 197, 198, 202, 203, 229, 231, 232, 234-235, 242, 243, 244, 249, 251, 253).

2. *Hauling by truck of agricultural supplies, equipment, and laborers* to and from the fields and hauling by truck plantation supplies and equipment from Honolulu to the plantation are likewise coordinated with and part of the over-all production operation.

Employees engaged in these hauling activities operate, repair, service and maintain the trucks and other equipment and facilities used in these activities, load and unload the supplies and equipment they carry, and maintain and repair the field roads located on the plantation (e.g. R. 164-166, 195, 197-198, 200-201, 227, 232, 233, 237, 242, 243, 244, 246, 247, 250).

3. *Repair and overhauling of agricultural equipment*¹⁰ is carried on as part of the integrated plantation operations. Because of the interdependence of the appellant's operations, breakdowns of agricultural equipment and machinery may result in a shutdown of the entire operations (R. 195). It is necessary therefore for appellant to maintain the service shops previously mentioned, *supra*, p. 7.

Employees attached to these service shops and also other employees perform necessary maintenance, service, repair and overhauling work on all types of agricultural equipment and implements used in the growing of sugar cane

¹⁰ The court below held repair work on agricultural equipment to be exempt only if done in emergencies *and* in the cane fields (R. 442).

on the appellant's plantation (e.g. R. 195 *et seq.*, 225, 226, 227, 229, 230, 231, 232, 233, 241, 242, 243, 244, 245, 246, 247).

4. *Shoeing of horses and mules* is done on the appellant's plantation. Horses are used by the harvesting overseer to ride in the fields. Pack mules are used on occasion to pack agricultural supplies, broken concrete flumes, etc., used in the cane fields (R. 210). Employees feed the horses and mules and also shoe them (R. 210, 244).

5. *Storage and handling of plantation supplies and equipment*, referred to on p. 7, *supra*, are done by warehousing personnel. Among the items stored are herbicides, fertilizer, farm equipment, lubricants, fuel oil, and cement. Such employees do the bookkeeping, handle the accounts, unload, unpack, check and store stocks and materials, keep stock record cards, take inventory, check out merchandise to mill, fields, and shops, and prepare order lists for new materials and supplies (R. 207, 208-209, 251, 253, 254).

6. *Construction and repair of irrigation and water supply facilities and equipment* are required for the entire plantation acreage devoted to sugar cane production (R. 145). In addition, water is required in the cane processing operations of appellant (R. 146, 170). As a consequence, an extensive and comprehensive system of water supply from surface and artesian sources has been developed on the plantation (R. 145, 146).

The employees engaged in these irrigation and water supply operations dig and maintain on the plantation trenches, ditches and tunnels used for irrigation and drainage of the appellant's cane fields and for irrigation pipe lines; build wooden gates for flumes; make irrigation scoops in connection with the irrigation operations; make concrete irrigation flumes and water supply pipe; weld irrigation pipe lines and siphons; operate, repair and maintain irrigation pumps and pumps used to supply water to the mill for cane processing; and perform other miscellaneous activities in connection with the irrigation and water supply operations (e.g. R. 150, 195, 196, 197, 198, 201, 202, 203, 206, 226, 228-229, 242, 243, 244-245, 248, 249, 252).

7. *Processing of sugar cane into raw sugar and molasses, temporary storage, loading and shipment of same and maintenance and repair of processing equipment.* Loaded cane cars are delivered on the appellant's narrow gauge railroad to the mill yard to be moved up to the mill (R. 166). At the mill, the cane is weighed, unloaded, washed, and as much trash as is mechanically possible is removed. Such trash is hauled away from the mill and unloaded in appellant's cane fields. Sometimes locomotives bringing in cane cars may move the cars directly into position for unloading into the mill (R. 166, 168-172, 237). After the cane is unloaded, the empty cars are removed to the mill yard (R. 166, 443).

The time elapsing between the loading of cars in the field and the unloading into the mill may vary from four to sixteen hours. Harvesting activities and mill activities are closely coordinated to reduce to a minimum this time lapse since sugar cane is highly perishable and starts to deteriorate once it is cut (R. 167).

The cane, after being cleaned, is crushed, the sugar juices clarified and crystallized, the raw sugar bagged and shipped, or temporarily stored and then shipped, and the molasses pumped into a storage tank (R. 172-183, 184-186). The molasses is thereafter delivered to a carrier for shipment to the continental United States (R. 181).

Employees perform the various duties connected with the processing of sugar cane into raw sugar and molasses and with the temporary storage, loading and shipment of same (R. 166 *et seq.*, 231, 234, 236-240, 251-252).

The processing operations also necessitate the maintenance of the service shops previously referred to (p. 7, *supra*). Machinery breakdowns in the mill may result in a shutdown of the entire mill which, because the harvesting and mill operations are so closely coordinated, in turn necessitates discontinuance of the harvesting and transportation operations until the mill repairs are completed (R. 195). Employees attached to the service shops and also other employees perform necessary maintenance, repair and overhauling work on the equipment and facilities

used on the appellant's plantation in the processing of sugar cane into raw sugar and molasses, the bagging of raw sugar and the loading, storing and shipment of raw sugar and molasses, while cane is being ground in the mill as well as during periods of shutdown on week-ends and in the "off-season" (e.g. R. 183-184, 195 *et seq.*, 212-214, 232, 236, 237, 238-239, 240, 241-242, 243, 244, 245, 246, 248, 249, 250, 255).

8. *Repair and maintenance* of plantation buildings and grounds and shop tools is done primarily by employees attached to the service shops and the village maintenance employees hereinafter discussed in Part IV of our Argument, but other employees may also perform such work (R. 202, 203, 212-214, 230, 231, 233, 240, 248, 249, 250, 254-255). Other employees work in the fields clearing same of stones, and loading and hauling away the stones which are used for structural or building purposes on the plantation (R. 140-141, 225, 226, 436).

9. *Power equipment and facilities*, already described, are operated, maintained and repaired as an integral part of the appellant's production of sugar cane and the processing of same into raw sugar and molasses. The employees so engaged are employed in operating, maintaining and repairing the equipment and facilities used by the appellant in its mill to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity (R. 189-190, 194, 201-202, 213, 214, 240-241, 248).

10. *Clerical* employees of appellant perform the necessary clerical work on the plantation, such as the keeping of books, records, time, etc., in connection with the appellant's entire plantation operations of producing sugar cane and processing same into raw sugar or molasses (R. 168, 171, 208-209, 236, 249, 251, 252, 253-254).¹¹

¹¹ There is nothing in the Record to support the finding of the court below that among the activities appellant conducts, in addition to those discussed in the text, are railroad building, surveying and fencing (R. 412).

C. THE LANGUAGE OF THE STATUTE SHOWS THAT ALL EMPLOYEES OF APPELLANT HERE INVOLVED FALL WITHIN THE EXEMPTION FOR "AGRICULTURE".

We submit that the court need only examine the definition of agriculture contained in Sec. 3(f) in order to conclude that the employees engaged in the above described operations come within the exemption provided by Sec. 13(a) (6) for "employee[s] employed in agriculture". The courts will give effect to the "plain meaning" of the statutory language (*United States v. American Trucking Ass'ns., Inc.*, 310 U. S. 534, 543; *Kirschbaum v. Walling*, 316 U. S. 517, 524) "according to the sense of the thing, as the ordinary man [would understand] ordinary words addressed to him". *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 618.¹²

1. "*Farming in all its branches*". The statutory definition of "agriculture" starts with "farming in all its branches" and then provides "and *among other things* includes" [Emphasis supplied]. There follows an enumeration of *several* farming operations. We shall show hereinafter that the farming operations enumerated embrace all the activities here involved. But apart from this, the use of the phrase "among other things" precludes any contention that the enumeration is anything more than illustrative of the plenary farming operations which the definition embraces.

Most of the appellant's operations held non-exempt by the District Court clearly come within the phrase "farming in all its branches".

¹² Since the statute itself defines its exemptions in precise and definite terms, the court below erred in admitting the opinion testimony on those exemptions as here applied of Jack Hall, Regional Director of the International Longshoremen's and Warehousemen's Union for the Territory of Hawaii. Congress was unwilling to have the application of the Act, including the exemptions, rest upon the indefinite and nebulous basis of "expert" opinion. Mr. Hall's argumentative testimony really invaded the province of the court. His testimony should also have been stricken as hearsay (R. 268, 323-325, 327, 328, 329) and as lacking in credibility (R. 319-320, 321-323).

Thus, it is an indispensable part of sugar cane farming: (i) to haul the harvested perishable cane from the fields on the plantation to the mill on the plantation for quick delivery for processing (R. 133, 167) and to maintain, service and repair the hauling facilities; (ii) to haul fertilizer, insecticides, herbicides, agricultural equipment and supplies¹³ and field laborers from one part of the plantation to another and to maintain, service, repair and operate trucks and field roads used for such hauling; (iii) to haul necessary supplies and equipment from a nearby town to the plantation and to maintain, service, repair and operate the hauling facilities; (iv) to repair and overhaul agricultural equipment and implements used in the cane production; (v) to feed and shoe horses and mules used on the plantation in connection with the growing of sugar cane; (vi) to irrigate cane fields where there is insufficient rainfall and to maintain, service, repair and operate irrigation facilities located on the plantation itself and used exclusively in connection with the production of its cane (R. 111, 145 *et seq.*, 256); (vii) to maintain the farm buildings and grounds and tools and implements used in the farming operation; and (viii) to keep necessary records by clerical help where required.

Each of the above activities conducted by the appellant is an integral part of its operations of producing, cultivating, growing and harvesting sugar cane. As such they all fall within the statutory phrase "farming in all its branches". Such activities are functionally similar to the activities conducted by vast numbers of grain farmers, cotton farmers, fruit and vegetable farmers, etc., in various areas of the country.

2. "*Harvesting of . . . agricultural . . . commodities.*" The court below held the term "harvesting" appearing in Sec. 3(f) of the Act to embrace the operations of lay-

¹³ Appellees' original Answer admitted that the transportation of fertilizer and other field supplies from the appellant's storage places and yard area to its fields is within the exemption (R. 124). The lower court nonetheless denied the applicability of the exemption to such operation.

ing and shifting portable tracks in the fields, spotting rail cars on such tracks, loading same with cane, hauling them from the fields to the main railroad tracks, and picking up and reloading cane stalks which fall from the cars between the fields and the mill (R. 428-429, 442). We submit that the hauling, likewise on the plantation itself (R. 159), of sugar cane on the permanent tracks from the fields to the mill clearly falls within the term "harvesting of . . . agricultural . . . commodities" appearing in Sec. 3(f).

In Webster's New International Dictionary¹⁴ the term "harvest" is defined, p. 1142, as: ". . . To reap or gather, as any crop, material, or result. . . *To gather in a crop*" [Emphasis supplied]. The Standard Dictionary published by Funk and Wagnalls (1935 Ed.) defines the verb "harvest" as: "1. To gather and store, as a crop, reap. . . . 3. *To gather and store a crop*" [Emphasis supplied]. The Encyclopedia Britannica (14th Ed.) at page 231 carries the word "harvest" as a principal heading and in relevant part speaks of "Harvest, the season for the ingathering of crops. . . ."

The appellant's operations of hauling perishable sugar cane from the fields to the mill on its main line tracks—all on the farm—are merely part of the gathering in and storing of sugar crops, and as such are part of "harvesting" of the sugar cane, just as much as it is a part of the harvesting operations for a farmer to gather in freshly cut stock feed for storage in a silo.

No reason exists for drawing any distinction between that part of the hauling operation which takes place on the portable tracks and that part which takes place on the permanent tracks.¹⁵ Both are a part of the "gathering in" of the sugar crops. The portable tracks are used in the fields instead of the permanent tracks only because permanent tracks cannot be laid on account of the inter-

¹⁴ All references to Webster's Dictionary are to the Unabridged Version, Second Edition, 1945.

¹⁵ Nor did the District Court distinguish fully between the two types of hauling, since it exempted the picking up and reloading of fallen cane stalks, even when done on the main line trackage.

ference which would otherwise result in planting and cultivating operations (R. 160). During the short periods when portable tracks are in use in the fields, they are an integral part of the railroad system over which cane cars move directly from the fields to the mill (R. 160).

The court below appeared to have denied exemption to the railroad transportation operation because it is specialized and technical work (R. 426). The railroad operation in the case at bar, however, is not comparable to a railroad facility and operation separate and apart from the farming operation. It is constructed and operated to fit the special needs of an integrated sugar plantation. The cane cars are only 10 or 11 feet by six feet by five feet (R. 160) and carloads average only 4 and $\frac{3}{4}$ tons per car gross cane (R. 157). This is to be contrasted with normal sized freight cars which measure 40 feet by 10 feet by 9 feet and if fully loaded would carry an average of 50 tons of cane. *1946 Car Builders' Cyclopedia of American Practice*, (17th ed.), edited by Roy V. Wright for Association of American Railroads, pp. 122-3. Further, many employees engaged in this transportation operation are used interchangeably in other parts of the appellant's plantation operations (R. 163, 229, 230, 231, 232-233) and likewise many service shop and other employees engage in the transportation operations as well as in other parts of the plantation's total operations (R. 195, 196, 197, 198, 201, 202, 236, 237, 242, 243, 244, 249, 251, 253).

The court below went on to hold that the exemption would not apply even if the cane were hauled by trucks rather than railroad (R. 427, 428).¹⁶ The court thus denied the exemption to the hauling operation *per se* regardless of the medium, i. e. truck, train or animal-drawn vehicle. The record establishes beyond question, however, that appellant's railroad operation is in fact an integral part of

¹⁶ It was admitted by counsel for appellant during oral argument that Waialua Agricultural Company, Ltd. was considering the hauling of its cane from the fields to the mill by truck and closing down the operation of the railroad as had been done by some other plantations in Hawaii.

its business of growing sugar cane and gathering in the sugar crops, and nothing more. Such operation is a part of "harvesting" and consequently within the exemption.

3. "*Practices (including any forestry or lumbering operations) performed by a farmer . . . as an incident to . . . such farming operations.*" The exemption also includes "practices (including any forestry or lumbering operations) performed by a farmer . . . as an incident to . . . such farming operations." This part of the statutory definition not only clearly embraces all the activities shown to fall within the term "farming in all its branches," but also the activities involving the processing of sugar cane into raw sugar and molasses as well as the other activities heretofore described which the District Court held to be non-exempt.

The term "farmer" as used in the definition necessarily means a person or company engaged in performing the operations enumerated in the definition of "agriculture." The term "such farming operations" of course means the operations previously described in Sec. 3(f), among which operations are "production, cultivation, growing, and harvesting." It is clear then that appellant is a "farmer" conducting the "farming operations" of producing, cultivating, growing and harvesting sugar cane. The appellant's operations described in subparagraphs 1 to 10 (pp. 17 to 21, *supra*) are then practices performed by a farmer,

The next and separate question is whether appellant's sugar cane processing activities and its other activities held non-exempt by the District Court are "an incident to" the production, cultivation, growing and harvesting of sugar cane. We submit that they are. Webster's Dictionary defines the word "incident" as an adjective on page 1257 as:

"1. Liable to happen; apt to occur; befalling; hence, naturally happening or appertaining, esp. as a subordinate or subsidiary feature . . . 4. Pertinent . . . 5. Law. *Dependent on, or appertaining to, another thing* (the principal); *directly and immediately pert. to,*

or involved in, something else, though not an essential part of it . . .” [Emphasis supplied].

The word “incident” as a noun is defined on page 1257 as

“ . . . 2. That which happens aside from the main design; *subordinate action*; . . . 3. Law. *Something appertaining to*, passing with, or *depending on*, another, called the principal . . .” [Emphasis supplied].

Appellant’s operations are all completely integrated and interdependent (R. 129 *et seq.*); and the lower court found that the growing, harvesting and milling operations are all coordinated (R. 413). Agricultural supplies, equipment and laborers must be transported to the fields in order that sugar crops may be produced and harvested. The various activities relating to irrigation, including the concrete products operations, must be conducted, since appellant’s plantation requires intensive irrigation (R. 145, 206-207). To prevent spoilage and deterioration the crops must be transported to the mill immediately after being burned or cut (R. 167-168). Once they reach the mill they must, for like reasons, be processed into raw sugar almost at once (R. 133, 167-168). The furnishing of water and power¹⁷ used in connection with the growing and processing of cane, the operation of storage places and the various clerical activities are functionally necessary and indispensable for the conduct of the entire operations of appellant (e. g. R. 145 *et seq.*, 186 *et seq.*, 207-209, 253-254). The most efficient and profitable operations call for shipment of the raw sugar to mainland refineries immediately upon production (R. 185). The service shops are maintained for constant repairs and overhaul, lest a breakdown in milling, harvesting or transportation cause a shutdown of appellant’s total operations (R. 194-195).

Thus, the activities in connection with the processing of sugar cane into raw sugar and molasses, as well as all other activities heretofore described, which the District

¹⁷ It will be noted that almost 50 percent of the power is distributed to pumps on the plantation used to supply water for irrigating the appellant’s cane fields (R. 192).

Court held to be non-exempt, "appertain to," "depend on," and are "directly and immediately pertinent to, or involved in" the operations of producing, cultivating, growing, and harvesting sugar cane. The "main" action or "design" is such production, cultivation, growing, and harvesting and all these other operations are "incident" to such "main design." In addition all of these other operations are "subordinate or subsidiary feature[s]" of that "main design."¹⁸ It follows that all such subordinate operations are "practices . . . performed by a farmer . . . as an incident to . . . such farming operations" and are thus within the exemption for "agriculture."

4. *"Practices (including any forestry or lumbering operations) performed by a farmer . . . in conjunction with such farming operations."*

"Conjunction" is defined in Webster's Dictionary at page 565 as: "1. . . . union; association; . . . 3. Occurrence together; concurrence as of events . . ." [Emphasis supplied]. Since all the operations in question are, as we have shown, completely integrated and interdependent with the appellants' production, cultivation, growing and harvesting of sugar cane, they are surely in "association" therewith. Moreover, they "occur together" and are coordinated therewith (R. 135-136, 152, 413). They are therefore performed "in conjunction with" such operations.

¹⁸ The total direct operating charges of the appellant in operating its plantation for the calendar year 1945 were \$1,726,278.24. Of this amount, \$1,230,393.63 or 71% was for cultivating, irrigation water supply, harvesting, transporting of cane and other general field expenses, and \$495,884.61 or 29% was for operating and maintaining the mill and purchasing sugar bags. The total number of hours of direct labor attributable to the sugar operations of the appellant for the calendar year 1945 was 1,332,679.50. Of this number, 1,024,876.25 hours were for cultivating, irrigation water supply, harvesting, transporting and other work relating to field operations while 307,803.25 hours were for operating and maintaining the mill (R. 116, 218-219, 256). The facts and figures above set forth for 1945 present a picture which is substantially true at the present time (R. 224).

5. "*Practices (including any forestry or lumbering operations) performed . . . on a farm as an incident to or in conjunction with such farming operations.*" The undisputed facts show that all the operations in question, except occasionally when truck drivers go off the farm to obtain supplies and equipment of which there is a shortage, take place solely on the farm where the cane is grown, *i.e.*, the place where the appellant's operations of producing, cultivating, growing, and harvesting sugar cane take place (R. 135).¹⁹ The lower court also recognized that all such operations take place *on the farm* (R. 411).

Since they take place "on a farm" and, as we have shown, they are "incident to or in conjunction with such farming operations," for this reason also, such activities are within the statutory exemption.

6. "*Preparation for market, delivery to storage or to market or to carriers for transportation to market.*"

Since sugar cane is always processed into raw sugar, syrup or molasses before moving in commerce (R. 133), clearly the processing operations performed by appellant upon the sugar cane and the operation of service shops and other facilities necessary and related to such processing constitute "preparation [of sugar cane] for market." This is so even though they effect a change in the raw and natural form of the sugar cane. Congress plainly did not intend that the "preparation for market" referred to in Sec. 3(f) must be preparation of agricultural commodities "in their raw or natural state," for in a closely related exemption provision, namely Sec. 13(a)(10) which exempts employees engaged within the area of production in

¹⁹ The Secretary of Agriculture has determined that in the case of Hawaii "a farm means all land which is farmed by a producer, or group of producers as a single farming unit, with cropping practices, work stock, equipment, labor, and management substantially separate from that of any other such unit". See Determination of a Farm, etc. for the Territory of Hawaii issued by the Secretary of Agriculture, October 7, 1937, pursuant to subsec. (B) of Sec. 304 and subsection (E) of Sec. 301 of the Sugar Act of 1937. 2 F. R. 2108. Appellant's plantation meets this definition (R. 135).

performing certain operations upon agricultural commodities, Congress specifically limited the exemption to "preparing [agricultural commodities] in *their raw or natural state*" [Emphasis supplied].

Moreover, the delivery of raw sugar to the sugar warehouse constitutes "delivery to storage" and the sugar shipping operations constitute "delivery . . . to market or to carriers for transportation to market." In this connection it must be emphasized that the reference to "transportation" in Sec. 3(f) follows the reference to "preparation for market." This clearly suggests that the statute refers to transportation taking place after the preparation for market of the agricultural commodity has been completed, *i. e.* transportation to market of the prepared product.

The irrigation operations, the transportation of sugar cane from the fields to the mill, the transportation of supplies and laborers to and from the fields, and the operation of service shops and other facilities functionally necessary and indispensable to the production, cultivation, growing, and harvesting of sugar cane all precede "preparation for market, delivery to storage or to market or to carriers for transportation to market," and are therefore *a fortiori* exempt.

7. *Erroneous interpretations of District Court.* (i) The lower court limited the incidental and conjunctive practices which the Act exempts to such operations as spraying, fertilizing, irrigating, pruning, pollinating, grafting, fire or frost protection, milking, slaughtering, shearing, hide preservations, castrating, branding and similar practices that appertain to particular branches of farming, nursery, and ranching (R. 422-423). But this list is composed predominantly of activities that fall squarely within specific terms in the statutory definition of "agriculture", to wit, "cultivation and tillage of the soil," "dairying," "production, cultivation, growing, and harvesting of any agricultural or horticultural commodities," and "the raising of livestock." In order to give meaning to the remainder of the definition in Sec. 3(f), that is the part which ex-

empts incidental and conjunctive practices, the exemption cannot be limited to activities covered specifically by earlier portions of the definition.

The central fallacy in the opinion below stems from the untenable position that highly integrated or mechanized operations are necessarily industrial and therefore excluded from the agricultural exemption. *Supra*, pp. 16-17.²⁰ While we agree with the District Court that it is immaterial in the application of the agricultural exemption as to how a particular farm became integrated or large or the owner of its own sources of supply (R. 424), the case here is not one where a large industrial concern proceeded to buy up various agricultural and nonagricultural enterprises and merge them into one enterprise. The record shows that appellant's plantation has been substantially the same size since 1910 (R. 133), and that throughout Hawaii, sugar cane grinding is ordinarily performed by the plantation itself on the cane that it grows (R. 131, 184), a fact which was admitted by appellees' witness Hall (R. 325-327).

(ii) Contrary to the reasoning of the District Judge (R. 423, 424, 426-428), the farmer does not forfeit his farm exemption merely because he himself conducts various operations which are not exempt when conducted by independent businesses. Sec. 3(f) specifically says that all activities performed *on the farm or by the farmer* are exempt so long as they are incident to or in conjunction with the farming operations conducted on the farm. For example, transportation of produce to market is exempt when done by the farmer but not when conducted by an outsider as an independent business.

(iii) The court below also took the untenable position that the exemptions under Sec. 13(a)(6) and Sec. 7(c) are mutually exclusive (R. 420). The two exemptions in fact overlap in significant respects. For example the making of butter and cheese by the farmer from the milk of his

²⁰ The court in this connection made prejudiced and completely unsupported statements regarding the function and growth of Hawaiian sugar plantations generally (R. 423).

own cows is exempt under Sec. 13(a)(6), while such operations constitute the "first processing of milk . . . cream into dairy products" under Sec. 7(c) regardless of where the milk and cream come from; the ginning of cotton grown by the ginner himself is exempt under Sec. 13(a)(6), while the ginning operation is exempt under Sec. 7(c) regardless of who grows the cotton; the canning of fresh fruit grown by the canner himself is exempt under Sec. 13(a)(6), while the canning operation is exempt under Sec. 7(c) regardless of who grows the fruit (see *Bruno v. Hills Bros. Co.*, 7 Labor Cases ¶61,763); the stripping and stemming of tobacco grown by the stripper and stemmer himself is exempt under Sec. 13(a)(6), while the stripping and stemming operations are "first processing" of an "agricultural . . . commodity" under Sec. 7(c) regardless of who grows the tobacco; the slaughtering by the farmer of hogs raised by him is exempt under Sec. 13(a)(6), while the slaughtering of hogs is "slaughtering . . . livestock" under Sec. 7(c) regardless of who raises the hogs.

As for sugar cane, Sec. 13(a)(6) exempts the processing of sugar cane into raw sugar when performed by a farmer upon his own crop, but grants no exemption at all to the sugar cane processor who processes cane grown by others. On the other hand, Sec. 7(c) does grant exemption to the sugar cane processor who processes cane grown by others. Thus the two exemptions have different meanings and can properly exist side by side. It is true that Sec. 7(c) also exempts the processing operations of a farmer who processes his own cane, but that does not mean that the Sec. 7(c) exemption is meaningless if Sec. 13(a)(6) is also construed as covering such processing operations.

This overlapping of the two exemptions is fully understandable. Sec. 13(a)(6) is an exemption from both the wage and hour provisions of the Act, while Sec. 7(c) is an exemption from the hour provisions alone. Congress intended that if a farmer processes his own crops, such processing should be exempt under Sec. 13(a)(6). On the other hand if a person engages in the business of processing

crops of others, independent of such person, as well as his own crops, such person was to enjoy only the more limited Sec. 7(c) exemption.

D. THE LEGISLATIVE HISTORY OF SECS. 13(a)(6) AND 3(f) ALSO SHOWS THAT ALL EMPLOYEES OF APPELLANT HERE INVOLVED FALL WITHIN THE EXEMPTION.

Assuming *arguendo* that interpretation of the statutory language is in doubt and requires resort to the legislative history to resolve any ambiguity,²¹ that history emphatically underscores appellant's interpretation of the dominant Congressional purpose.

1. *Senate proceedings.* S. 2475²² which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced, agricultural laborers were exempt but there was no definition of the term "agricultural laborer."

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption and defined "agriculture" as including

" . . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and *any practices ordinarily performed by a farmer as an incident to such farming operations*" [Emphasis supplied]. S. 2475 as reported in the Senate July 6, 1937, Section 2, pp. 50-51.

²¹ *United States v. C. I. O.*, 68 Sup. Ct. 1349, 1352-1353; *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 615, 617-618; *U. S. et al. v. American Trucking Associations, Inc.*, 310 U. S. 534, 547 *et seq.*

²² The bill in its various forms—as introduced, as reported, etc.—referred to in this discussion of the legislative history will be found in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550—J-50-2d Set."

The report accompanying the bill contained only a brief statement that there was excluded from the bill—

“persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations” (S. Rep. 884, 75th Cong., 1st Sess., p. 6).

Senator Black, chairman of the Senate Committee in charge of the bill, in opening the Senate debate on the bill, stated that it—

“specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal” [Emphasis supplied]. 81 Cong. Rec. 7648.

Appendix “A” herein, p. 81, *infra*, sets forth additional parts of Senator Black’s statement.

In debate, Senator Pope asked if “dairying” would include “the farmer who bottles his own milk and cream and sells it” “even though he might do it in considerable quantity.” Senator Black answered, “Unquestionably,” and further, “I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that he bottles it would not change his characteristics from that of a farmer.” 81 Cong. Rec. 7656.

Senator Copeland read a telegram from the International Apple Association urging that the agricultural exemption be amended to include “preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities” *Id.*, p. 7656. Senator Black commented that the Committee was not in favor of exempting the packing business as it related to many agricultural products. But he significantly added: “*The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone*

or in cooperation with his farming neighbors . . .” [Emphasis supplied]. *Id.*, p. 7657.²³

Senator Overton then asked Senator Black whether if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black said yes, that that would be a process in the agricultural handling of cotton and that the “bill does provide that *those things done with reference to commodities produced on the farm by the farmer on the farm are not included in the possible application of the Act*” [Emphasis supplied]. *Id.*, 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that “when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation,” stated as follows: “Going into another phase of farming, let us take the man who raises hogs. *A great many farmers who raise hogs kill their hogs on their own farms...They prepare the hogs for market on their own farms, and then send out the product.* As the bill is framed, *there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . . .*” [Emphasis supplied]. *Id.*, p. 7659.

The debate went further and specifically addressed itself to the processing of sugar cane. Senator Overton inquired whether a sugar plantation with a mill at which it processed its own cane into sugar would be exempt. Senator Black replied that it would depend upon whether such

²³ Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing same in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658. See also similar statements by Senator Schwellenbach (*Id.*, p. 7659) Appendix “A” herein, p. 81, *infra*.

processing was *ordinarily* performed by a farmer upon his crop. *Id.*, pp. 7657-7658. See Appendix "A" herein, pp. 81-83, *infra*. Since the word "ordinarily" was later stricken from the exemption before the bill was enacted, it is obvious that the grinding by a farmer of his own cane was intended to be within the exemption whether or not "ordinarily" a farmer does such grinding. In any event, cane grinding is "ordinarily" performed on its own plantation by the appellant itself on the cane that it grows, following the usual practice in Hawaii. *Supra*, p. 31.

As for exemption of operations and facilities functionally necessary and indispensable to the growing and processing of sugar cane and to the shipment of raw sugar so processed, this too was not left in any doubt. On July 30, 1937, Senator McGill introduced an amendment (*Id.*, p. 7888) to provide that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. His amendment further provided that following the words "any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations," there be added the words "including delivery to market."

Senator McGill stated that the purpose of his amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was merely preparatory to the marketing of the field crop and that the amendment would also include all kinds of labor performed in connection with making delivery to market of agricultural products. *Id.*, pp. 7888, 7927, 7928. The amendment was adopted. *Id.*, p. 7888. The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix "A" herein, pp. 84-86, *infra*.

The bill as passed by the Senate on July 31 defined "agriculture" in relevant part as including

“ . . . any practices *ordinarily performed* by a farmer or on a farm as an incident to such farming operations, including delivery to market” [Emphasis supplied].

2. *House proceedings.* The bill was thereupon referred to the House Committee on Labor. As reported by such Committee on August 6, 1937 “agriculture”, insofar as relevant here, was defined as including

“ . . . any practices performed by a farmer or on a farm as an incident to such farming operations, including delivery to market . . . ” [Emphasis supplied]. H. Rep. 1452, 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck “ordinarily” from the definition of agriculture, so that the definition included *any practices* performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had stricken the word “ordinarily,” thus showing that such action was not inadvertent. *Id.*, p. 11. And the definition as ultimately enacted did not contain the word “ordinarily” or any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, “agriculture” was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of “agriculture” was again broadened, and, insofar as relevant, read as follows:

“ ‘Agriculture’ includes . . . any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market” [Emphasis supplied]. H. Rep. 2182, 75th Cong. 3d Sess., p. 2.

This definition added the phrases: "preparation for market,²⁴ delivery to storage . . . or to carriers for transportation to market." The bill passed the House on May 24, 1938 in this form.

3. *Conference Report and debates thereon.* The Conference Report not only retained every single amendment that had broadened the definition of "agriculture," but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm "*in conjunction with such farming operations.*" 83 Cong. Rec. 9253-9254. Thus Congress was even unwilling to restrict the definition to practices that were *incident to* farming operations, but made explicit its intent that the exemption should apply as well to practices *in conjunction with farming operations.*

In Senate debate on the Conference Report, Senator Elbert D. Thomas, who had succeeded Senator Black as chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix "A", herein, p. 87, *infra*.

4. *Conclusion.* The legislative history shows that Congress started with a very broad, comprehensive definition of agriculture, and that such definition at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, was made more and more all-inclusive. Practices "performed . . . on a farm" as an incident to farming operations were added to the original definition, which was intended to include such highly mechanized or industrialized operations as milk bottling, cane sugar grinding, fruit packing, cotton ginning and hog slaughtering, and all without qualification as to whether they were "ordinarily" performed

²⁴ Unlike similar language in Section 13(a) (10), this is not limited by the requirement that the preparation for market of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer or on a farm is exempt even if in such preparation the raw or natural state of the commodities is changed.

by the farmer or on the farm. Also exempted were "preparation for market," "delivery to . . . market," "delivery to storage," "delivery to . . . carriers for transportation to market," and finally, practices "performed . . . in conjunction with" farming operations.

No distinction was drawn by Congress as between "large" or "small" farms or between "hand labor" or "mechanized" farms. Congress granted a sweeping exemption to *all* "agriculture," regardless of the mechanized character of the operations in order not to impose upon *any* agriculture the costs and other obligations imposed upon industry. Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill could not have been enacted into law (83 Cong. Rec. 7393, 9257).

5. *Subsequent Congressional consideration.* The proceedings in Congress subsequent to enactment of the Act may also be searched in ascertaining the Congressional purpose. *Cf. Hilton v. Sullivan*, 334 U. S. 323, 339, note 18. *United States v. South Buffalo Ry. Co.*, 333 U. S. 771, 774-780. Such proceedings particularly emphasize our conclusion that operations are not to be withdrawn from the agricultural exemption because they are highly mechanized.

The last few annual reports by the Administrator of the Wage-Hour Division, U. S. Department of Labor (hereinafter called the Administrator) to Congress recommended legislation to narrow the agricultural exemption with reference to "industrialized farms." Annual Report of the Administrator, 1943-44, p. 8; *id.*, 1944-45, p. 1; *id.*, 1946, pp. 52, 66-68. The Administrator's Report for 1946 stated that the existing exemption in Sec. 3(f) "applies to employees in all branches and types of farming *as well as to those engaged in some activities which are not primarily agriculture, if they are performed by a farmer or on a farm as an incident to, or in conjunction with farming operations*" (p. 66) [Emphasis supplied]. The Reports emphasize the very factors relied upon by appellees and the court below in recommending legislation to deny the ex-

emption to employees of "industrialized" as distinguished from "family-type" farms. *Id.*, pp. 66-68.

It is most significant that Congress has not acted favorably on any of these recommendations, or on any of the numerous bills introduced to the same effect, e. g., S. 2861 (by Mr. LaFollette) 77th Cong. 2d Sess.; S. 2062 (by Mr. Thomas *et al.*), 80th Cong. 1st Sess. Nor has Congress responded favorably to arguments in support of such bills urged by the very union here involved with respect to Hawaiian sugar plantation labor engaged in field and processing operations. See *Hearings on S. 1349*, Committee on Education and Labor, 79th Cong., 1st Sess., pp. 1048-1070; *Hearings on S. 2386* (among other bills), Committee on Labor and Public Welfare, 80th Cong., 2d Sess., pp. 317-334.

In sum, the statutory interpretation by the court below, excluding "industrialized" operations on a farm, finds no support either in the language of Sec. 13(a)(6) or in the Congressional purpose of that language as disclosed by its context and legislative history. Appellees' argument is essentially one of policy that should be addressed to Congress, not the courts. See *Hilton v. Sullivan*, 334 U. S. 323, 339. "For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events' . . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation' ". *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617, 618, *per* Frankfurter, J.

E. THE CASE LAW FURTHER SHOWS THAT ALL EMPLOYEES OF APPELLANT HERE INVOLVED FALL WITHIN THE EXEMPTION.

In *Damutz v. Pinchbeck*, 66 F. Supp. 667 (D. Conn. 1946) *aff'd* 158 F. (2d) 882 (C. C. A. 2), referred to at p. 16, *supra*, the Sec. 13(a)(6) exemption was held to apply even though the growing of the horticultural products involved in the case was highly mechanized. *Bruno et al.*

v. *Hills Brothers Co.*, 7 Labor Cases par. 61,763, decided by the District Court of Puerto Rico, held that the canning and packing of grapefruit and the curing of citron, which were raised by defendant on its own farms, came within the agricultural exemption. The court said that so far as work done on its own products is concerned, this was work “performed by a farmer” on its own farm as an incident to its farming operations and consisted in the preparation of these products for market.

McComb v. Farmers Reservoir Company, 167 F. (2d) 911, (C. C. A. 10) involved employees of a mutual irrigation company engaged in maintaining and operating the company’s irrigation system which furnished water to various farmers through a system of reservoirs and ditches located on the farmers’ lands. In holding the agricultural exemption inapplicable, the court carefully distinguished irrigation activities by the farmer such as those here involved, saying they were a part of agriculture within the meaning of the Act when “*carried on by a farmer in continuity with other operations of the farm as a link in a chain of events leading to the growing of agricultural commodities and in the subsequent preparation of such commodities for commerce*” (167 F. (2d) at 915) [Emphasis supplied].

In *Miller Hatcheries v. Boyer*, 131 F. (2d) 283, 285 (C. C. A. 8) employees working at a commercial chicken hatchery in a city were held exempt as being engaged in the “raising of . . . poultry,” notwithstanding that (i) the hatching of chicks by a commercial hatchery is an industrialized and highly specialized activity, having no direct connection with “farming operations”; (ii) “the economic function of such an urban establishment is completely dissociated from the . . . activities of producing and hatching eggs and feeding . . . poultry”; (iii) “when the hatching of chicks is thus transposed from the farm to a commercial establishment it ceases to be a technical farming activity”; and (iv) “the attributes of farm labor which justify its exclusion from the . . . Act” are not found in employees of a commercial hatchery.

McComb v. Consolidated Fisheries Co., 75 F. Supp. 798 (D. Del. 1948), held exempt under the related fisheries exemption in Sec. 13(a)(5),²⁵ a watchman, cook, office employee and odd-job men of a fish processing plant, not only during the fishing season but also in the off-season when the plant was being repaired. The odd job men among other things repaired and maintained the buildings comprising the plant, the machinery in the plant and the fish wharves. They also installed machinery, drove new pilings for the wharves, operated trucks to obtain material to make repairs and made forms for concrete foundations in connection with the repair and maintenance work. The court emphasized that the cleaning of the machines and repair of the plant are impossible while fish are being processed, and hence repair work is an essential and integral part of the processing and marketing of the fish products; that the fish exemption in Sec. 13(a)(5) was intended by Congress to do for the fishing industry what Sec. 13(a)(6) does for "agriculture"; and "the broad exemption for agriculture as provided by the Act would, if applied to the fishing industry, compel the conclusion now reached by this court" (75 F. Supp. 806).²⁶

²⁵ Sec. 13(a) (5) exempts from both the wage and hour provisions of the Act:

"any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof".

²⁶ In accord as to exemption under Sec. 13(a) (6) are: *Walling v. Rocklin*, 132 F. (2d) 3 (C. C. A. 8) (employees of a florist shop located in a city selling flowers grown by the employer at its greenhouse several miles away and also some flowers purchased from others); *Ridgeway v. Warren*, 60 F. Supp. 363 (M. D. Tenn. 1945) (cutting and manufacturing into lumber at a sawmill on the farmer's property the timber cleared from farm property so as to make the land available for agricultural purposes, even though the lumber operations were fairly extensive, the sawmill cutting about seven or eight thousand

Appellees placed great reliance below on three decisions of the United States Court of Appeals for the First Circuit all involving sugar operations in Puerto Rico. On analysis these cases are shown either to support appellant's contentions as to Sec. 13(a)(6) or at least to be clearly distinguishable from the case at bar.

In the most recent of these cases, *Vives v. Serralles*, 145 F. (2d) 552 (C. C. A. 1), the employer grew cane on several separate farms, on one of which was located a mill that it operated and at which it processed the cane that it grew. The employer also owned a railroad used in the transportation of the sugar cane from its outlying farms to the mill. Such railroad was not used to transport cane grown on the small farm where the mill was located. The case involved two groups of employees: (i) Employees who hauled the cane on the various outlying farms, after it was cut, to the particular farm's "concentration point" where a railroad siding was maintained, prior to its transportation to the mill. Such hauling to the concentration points was done in railroad cars pulled by oxen over portable tracks, in ox-carts, and in steel cars pulled by tractors. The cane was unloaded at such points and thereafter reloaded on railroad cars for transportation to the mill. (ii) The second group of employees worked on the farm where the mill was located. They hauled the cane from the fields of the farm to the mill on the farm, weighed it, lifted it by crane, and dropped it on the mill conveyor.²⁷

board feet of lumber a day). Cf. *McComb v. Super A Fertilizer Works*, 165 F. (2d) 824 (C. C. A. 1) (employees of a fertilizer manufacturer selling fertilizer to farmers for use in growing sugar cane held non-exempt, the fertilizer manufacturer not conducting any farming operations nor having anything to do with the growing of sugar cane by the farmers to whom he sold fertilizer nor performing any operation upon the farms of such farmers).

²⁷ In addition to such two groups, one other employee, a worker "of the mill boiler", was also in the case. As to him the only claim asserted by the employer was that he was exempt under Sec. 7(c). The court allowed the claim.

*The court held squarely that both groups of employees were engaged in "agriculture" and therefore exempt under Sec. 13(a) (6).*²⁸ It said that the situs of the activities in which the plaintiffs were engaged is the farm and that the transportation operations were really part of the "harvesting" as that term had been construed by the Administrator in par. 5(a) of his Interpretative Bulletin No. 14, 3 C. C. H. Labor Law Reporter (4th Ed.) par. 24, 488, discussed hereinafter at p. 48.

In view of the fact that the second group of employees was held exempt as well as the first group, and in view of the reason assigned by the court for its holding, namely that the situs of the activities of each group of employees was the farm, the case must be regarded as authority for the proposition that where, *as here, an employer's total operations take place on the farm where he grows cane and transports and grinds same into raw sugar*,²⁹ *all such operations are within the agricultural exemption.* As we have seen, the heart of appellant's operations is on the farm, the mill being completely surrounded by cane growing fields (R. 65, 114, 256).

In an earlier case, *Collazo v. Gonzalez*, 127 F. (2d) 934 (C. C. A. 1), the defendants owned a sugar mill where cane was processed. The cane was grown on farms owned jointly by the defendants, as well as on farms owned separately by them and also on farms owned by an independent grower. The defendants also owned and operated jointly a railroad system used to transport cane from all such farms to the mill. The facts were distinguishable

²⁸ The court below thus misinterpreted the *Vives* case in stating (R. 425) that there the agricultural exemption was held inapplicable to the transportation operation.

²⁹ The only operation of appellant's employees not conducted on its plantation is the driving of trucks into Honolulu or any other part of the Island of Oahu to obtain supplies and equipment (R. 166). This is clearly an exempt activity under Sec. 3 (f). See the dissenting opinion of Judge Phillips in *McComb v. Farmers Reservoir Company*, 167 F. (2d) 911, 916 (C. C. A. 10).

from the instant case in two important respects: First, the transportation facilities and mill there involved were not incident to farming operations by one owner-farmer. Here, appellant transports and grinds only its own cane. Second, the cane there involved, after being cut on a particular farm, was hauled to a "concentration point" at the edge of the farm where it was unloaded and from there, after being reloaded on railroad cars, was hauled on main line trackage to the mill. The employees involved in the case, aside from the mill employees, were those transporting cane from the "concentration points" to the mill.³⁰ Here, however, there is no "concentration point" at which cane is collected, unloaded and reloaded. Cane cut in the fields is loaded into rail cars and moved in one continuous operation over portable tracks and permanent tracks directly to the mill (R. 157, 160, 161-162). There is no common pile or piles of cane in any field and no cane is ever piled at the edge of the field (R. 363).³¹

The Court of Appeals for the First Circuit there held the Sec. 13(a)(6) exemption inapplicable both to the transportation employees and the mill employees. But notwithstanding certain *dicta* in the opinion, which we

³⁰ These facts appear both from the Court's statement of the facts and also from the Court's analysis of this decision, which it made in the *Vives* case in distinguishing such case from the *Collazo* case.

³¹ Most of the cane is pulled from its growing or standing position by the cane loading machine and deposited immediately in the rail cars (R. 155-156, 361). While some cane not easily reached by the cane loading machine is bulldozed into piles (R. 156, 229, 361) and other cane is severed from the ground by the bulldozer rake when such rake is used to cut fire breaks through the standing cane (R. 153) or to clear lines for the portable track (R. 154, 359-360, 361), all this cane is pushed on top of standing cane (R. 361). Hence, when the cane loading machine lifts such piled cane into the rail cars, it is at the same time lifting unsevered cane (R. 361). Thus, there is nothing in the Record to support the finding of the court below that the cane harvested on appellant's cane fields is assembled at centralized points ready for transportation (R. 428). It should also be noted that the bulldozer rakes are not normally used for piling cane but are used primarily to clear the lines for the laying of portable track (R. 362).

submit are contrary to the Congressional intent,³² the opinion emphasized that a different result would be reached if the case were one of "*farmers preparing their goods for market or sending their goods to market, or to storage, or to carriers to transport from farms to market*" as such activities "*are clearly exempt*"; or "*if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm*", 127 F. (2d) at 937-938 [Emphasis supplied]. And when the same court had such a case presented to it, as in the *Vives* case previously discussed, it held the employees exempt under Sec. 13(a) (6). So here where all the activities of appellant take place on the farm and constitute preparation for market, delivery to storage or to market or to carriers for transportation to market, all such activities are "clearly exempt".

Still an earlier decision, *Bowie v. Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1), involved employers engaged in transporting and processing cane grown by some 350 independent growers in addition to that which they grew themselves. Such cane of the independent growers was not grown on farms of the employers who operated the mill. Between 33 and 40 percent of the raw sugar produced by them was derived from the cane of the independent growers and necessarily, in transporting such cane the employees worked off the farm of their employer. The court held that the Sec. 13(a) (6) exemption did not apply to employees engaged in the mill operations, the transportation of raw sugar or molasses from the mills or warehouses, the transportation of sugar cane belonging to independent growers for grinding at the mills, and any necessary incident of the foregoing activities, including

³² These *dicta* are to the general effect that transportation from the concentration point to the mill is related to processing rather than to field operations, and that Sec. 13(a) (6) exempts only the latter. In this view, the transportation is necessarily exempt from overtime requirements under Sec. 7 (c). *Infra*, p. 57. See Appendix "D" herein, p. 93, *infra*, for a statement along these lines by the union here involved.

repair and maintenance of milling and transportation facilities.

This case is obviously distinguishable from the situation herein, where all of the cane transported and processed by the appellant is produced by the appellant farmer on its own farm (R. 159,184). *Dicta* in the opinion appearing to express a contrary view, like similar statements in the *Collazo* case, *supra*, are at odds with the Congressional intent as expressed in the language of Sec. 13(a) (6) and the legislative history, *supra*, pp. 22-40. Moreover, the Court of Appeals for the First Circuit expressly did not pass on that portion of the judgment of the district court exempting those employees engaged solely in transporting to the mill the cane which their employers grew, the very situation here involved. 123 F. (2d) at 391-392.³³

F. ADMINISTRATIVE INTERPRETATIONS.

1. *Hauling of cane grown on the farm to mill.* The Administrator's Interpretative Bulletin No. 14, issued August 21, 1939, construing Secs. 13(a) (6) and 3(f), specifically stated: "*If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term*", i.e. "practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations" [Emphasis supplied]. ¶ 10(f). The Administrator has never modified this position.

³³ See also *Quinones v. Central Igualdad*, 2 Labor Cases ¶ 18565 (1940), in which the District Court of Puerto Rico in upholding a demurrer to a complaint stated with reference to the exemption for "agriculture" in the Act:

"If the delivery to storage or to market or to carriers is included in the definition of agriculture, surely . . . the delivery of cane to the central [mill] for the purpose of grinding or processing is likewise included within the definition. Such being the case it necessarily follows that the delivery of cane by a farmer by any means available to him is a part of the farmer's operation or incident thereto."

Paragraph 5(a) of the same Bulletin stated that the term "harvesting of any agricultural or horticultural commodities", as used in Sec. 3(f), includes all "operations customarily performed in connection with the *removal of the crops by the farmer from their growing position in the field, greenhouse, etc.*" [Emphasis supplied]. In view of the perishable quality of sugar cane, which requires its being taken to the sugar mill and processed into raw sugar immediately after cutting, the removal of the cane to the mill is thus a part of the "harvesting" operation as the Administrator has construed the term.

Paragraph 10(c) of the Bulletin discussed the term "delivery to storage", which is described in the statute as a practice incident to or in conjunction with farming operations, and stated: "The term 'delivery to storage' includes *taking the commodities . . . to the places where they are to be stored or held pending preparation for or delivery to market*" [Emphasis supplied]. Appellant's activities of transporting sugar cane from the fields to the mill are so very nearly like delivering agricultural commodities to the place where they are to be stored or held pending preparation for or delivery to market that like such delivery, they too must be regarded as coming within the definition of "agriculture".

2. *Preparation for market (processing operations).* Paragraph 10(b) of the foregoing Bulletin dealt with the term "preparation for market", appearing in Sec. 3(f) as an example of the type practices incident to or in conjunction with farming operations which are embraced by the definition of "agriculture". It stated in part that the term "preparation for market" would seem to include the following activities when performed by a farmer: drying, packing and canning fruits and vegetables, *manufacturing raw sugar*, printing and packing butter, packing cheese, canning or packing any other dairy product, ginning cotton, and stripping and stemming tobacco. These are all highly industrialized operations.

Such interpretations are entitled to weight since they represent the "contemporaneous construction of [the]

statute by the men charged with the responsibility of setting its machinery in operation; of making the parts work efficiently and smoothly while they are yet untried and new''. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 548. See also *Miller Hatcheries v. Boyer*, 131 F. (2d) 283 (C. C. A. 8).

Following the decision in *Bowie v. Gonzalez*, 117 F. (2d) 11, discussed *supra*, pp. 46-47, however, the Administrator in September, 1941, issued a press release (2 C. C. H. Labor Law Service, ¶ 25,651.70) stating that in the light of that decision he was of the view that, contrary to the position taken in Interpretative Bulletin No. 14, the agricultural exemption does not apply to sugar mill employees even though the only cane they grind is that grown by the sugar mill owner in his own fields. We have already pointed out that the *Bowie* case stands for no such proposition, since the facts were that the mill ground not only cane which it grew but also a substantial amount of cane grown by a large number of growers who were wholly independent of the mill owner. Such change of opinion by the Administrator, moreover, is inconsistent with the language of the exemption provision, its legislative history, the case law which we have previously discussed, and with the continued exemption of processing of other commodities such as fruit packing and canning, canning dairy products, cotton ginning and tobacco stemming, which are equally industrialized. The Administrator's changed opinion is therefore entitled to no weight. *Skidmore v. Swift*, 323 U. S. 134, 140;³⁴ *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, 169.

It is likewise significant that the Administrator has never changed his view expressed in ¶ 10(f) of Interpretative Bulletin No. 14 that the transportation by a mill owner to

³⁴ In other fields of law also the principle adopted by the Supreme Court has been that administrative interpretations may be resorted to only where they have been consistent. See *Norwegian Nitrogen Co. v. U. S.*, 288 U. S. 294, 315, and cases cited therein; *Fishgold v. Sullivan Drydock Co.*, 328 U. S. 275, 290-291; *Phillips v. Walling*, 324 U. S. 490, 498.

his mill of the sugar cane he grows is exempt under Section 13(a)(6).

3. *Functionally necessary and indispensable operations.* Paragraph 12 of Interpretative Bulletin No. 14 stated:

“We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of ‘agriculture’ contained in Sec. 3(f). In our opinion such employees are exempt”.³⁵

Employees are thus exempt so long as their work is “in connection with the activities described in the definition of ‘agriculture’.” We have already demonstrated that the transportation of sugar cane which the appellant itself grows from the fields to the mill and the processing of such cane into raw sugar are activities described in the definition of “agriculture”. Likewise, of course, the production, cultivation, growing, and harvesting of sugar cane are activities described in the definition of “agriculture”. Thus, it is clear that in the Administrator’s opinion the employees engaged in the functionally necessary and indispensable operations are likewise exempt, such as employees in the service shops, irrigation activities, etc., since all such operations are “in connection with” the production, cultivation, growing and harvesting of sugar cane, the transportation of such cane to the mill, and the processing of same into raw sugar. The Administrator has in fact recently advised Congress that this is his view as to irrigation operations. See Appendix “B” herein, p. 88, *infra*.

³⁵ See also paragraph 10(f) of the Bulletin: “The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt.”

II.

EMPLOYEE APPELLEES, WHO ARE ENGAGED IN THE HAULING OF SUGAR CANE FROM THE FIELDS TO THE MILL, THE PROCESSING OF SUGAR CANE INTO RAW SUGAR, AND THEIR INCIDENTAL AND FUNCTIONALLY NECESSARY AND INDISPENSABLE OPERATIONS, ARE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SEC. 7(c).

Although all of appellant's activities come within the Sec. 13(a)(6) exemption from overtime requirements (in Sec. 7(a)), some of those activities also fall within the Sec. 7(c) exemption from overtime requirements; *i.e.*, the exemption of employees of an employer "in any place of employment" where the employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar". This is a material contention only if the court should be of the view that the Sec. 13(a)(6) exemption does not apply to exempt all of appellant's employees as we have contended above. In that case we submit that the employees not found exempt from overtime requirements under Section 13(a)(6) are necessarily exempt under Section 7(c). In this connection it is to be noted that in testimony before both House and Senate Labor Committees, the very union here involved conceded that (except during the off-season) all the Hawaiian sugar plantation workers are exempt from the overtime requirements of the Act either under Section 13(a)(6) or Section 7(c). *Hearings before Senate Labor and Public Welfare Committee on S. 2386* (among other bills), 80th Cong., 2d Sess., pp. 318-319; *Hearings before House Committee on Education and Labor on various bills to amend the Fair Labor Standards Act of 1938*, 80th Cong., 1st Sess., p. 1990. See Appendix "D" herein, p. 93, *infra*.

The form in which Sec. 7(c) is written leaves no room for doubt that it applies to a farmer who processes his own crops as much as to a processor who processes only the crops grown by others.

A. DESCRIPTION OF OPERATIONS HELD EXEMPT
AND NON-EXEMPT BY THE DISTRICT COURT.

The District Court confined the Sec. 7(c) exemption to the activities performed in the appellant's mill, and even then allowed the exemption only while cane processing operations were actually being conducted or during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed (R. 442-444). The court denied the exemption to (a) transportation of sugar cane from the fields to the mill, (b) repair and maintenance of equipment and facilities used in the processing of sugar cane into raw sugar and molasses, bagging raw sugar and loading, storing and shipping raw sugar and molasses, where such repair and maintenance are not performed in the mill building proper or take place neither at a time when cane processing operations are actually being conducted nor during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed, (c) repair, reconstruction, maintenance and operation of equipment and facilities used in connection with supplying water or power to the appellant's mill for cane processing, (d) loading and shipment of raw sugar and molasses out of storage places, bins or tanks where such sugar and molasses have previously been temporarily stored, (e) week-end cleaning and repair of the appellant's mill and equipment therein, (f) repair of the appellant's mill and the equipment therein during the appellant's off-season, and the operations incident and functionally necessary to the transportation of sugar cane from the fields to the mill and the processing of sugar cane into raw sugar. These operations and activities held non-exempt³⁶ have been previously described. *Supra*, pp. 8, 17-18, 19-21.

³⁶ One other operation held non-exempt under Sec. 7(c), namely that connected with the appellant's plantation villages, is discussed *infra*, pp. 78-79.

B. THE LANGUAGE OF THE STATUTE PLAINLY SHOWS THAT THE EMPLOYEES OF APPELLANT HELD NON-EXEMPT UNDER SEC. 7(c) OF THE ACT BY THE DISTRICT COURT ARE WITHIN SUCH EXEMPTION.

Sec. 7(c), insofar as relevant, exempts, without time limit, all employees in "any place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup".³⁷ The exemption is fully applicable here.

1. *Appellant is engaged "in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup"*.

Appellant is engaged in just two things: (a) producing sugar cane, and (b) processing same into raw sugar and molasses. Insofar as it is not held to be engaged in producing sugar cane, and hence not exempt under Sec. 13(a) (6), it must be held engaged in processing cane into raw sugar or in activities necessary and related thereto, and hence exempt under Sec. 7(c).

Employees working in the service shops, those transporting sugar cane from the fields to the mill, those loading and shipping raw sugar and molasses, those doing clerical work, those who carry away from the mill the dirt and rock removed from the cane when it is cleaned, and all the other employees under consideration now, are just as indispensable and as much related to sugar cane processing as employees watching gauges in the boiling house or otherwise operating the processing machinery. Employees who keep the machines in repair at the machine shop are as much engaged in processing as those who repair the machines during breakdowns at the mill with the operating staff of appellant standing by waiting for repairs to be completed. All the repair work, wherever and whenever done, is an

³⁷ The court below misread Sec. 7(c) in finding that it exempts the "first" processing of sugar cane (R. 420, 430). A careful reading of the Section will show that it exempts the "processing" of sugar cane and that there is no requirement that the "processing" be "first" processing, unlike the language as to "first processing" of other commodities referred to in the subsection.

indispensable requisite to the continued and effective operation of the processing facilities (R. 194, *et seq.*).

The employees who operate and maintain the equipment and facilities used in connection with the production and distribution of power are also clearly engaged in processing sugar cane. The bagasse they burn is used as fuel for the production of power for use in performing the various processing operations (R. 186-187). Even the steam that is used to generate electric power needed in the various plantation operations, after passing through the generating machinery, is conveyed through steam lines for further use in the mill's processing operation (R. 190-191). Plainly, then, the power activities are just an integral part of the processing operations. So also since the supply of water to the mill is indispensable to the performance of the cane processing operations, the employees who operate and maintain the facilities and equipment used to supply such water to the mill must be considered as engaged in the processing operation itself.

2. *The employees work in the "place of employment where he [the appellant] is so engaged" in the processing of sugar cane.* All the employees engaged in the activities presently under consideration work on the same premises where their employer is "processing . . . sugar cane . . . into sugar". This is shown by the entire Stipulation (R. 129-256). See particularly Exhibits A and F of the Stipulation (R. 65, 114, 256). The buildings in which they work, including the mill, service shops, storage places for appellant's supplies, and other buildings, are located in a small compact and contiguous area of the plantation (R. 138). All repair and shipping activities of appellant take place within 300 feet of the mill building proper (R. 114, 195, 256). Therefore, they must in fact be viewed as working in the "place of employment where he [the appellant] is so engaged". The term "place of employment" cannot mean simply a single building, when the operation, of practical necessity, requires more than one building. It must embrace the entire premises on which are located all the build-

ings required in the "processing of . . . sugar cane . . . into sugar". If Congress had meant to limit the exemption to those working in the mill building or establishment, it could easily have selected apt words thus to indicate its purpose, as it did in other sections of the statute.³⁸ Even the Court below agrees with these views (R. 431).

3. *The exemption provided by Sec. 7(c) for the processing of sugar cane into sugar or syrup is a year around exemption.* Sec. 7(c), it will be noted, grants some industries year around exemptions from the overtime provisions of the Act while other industries are given such exemption for only 14 workweeks per year. The industries granted year around exemption include those engaged in processing of sugar cane, sugar beets, sugar beet molasses or maple sap into sugar or syrup. Congress must have known that many employers in the industries to which it granted year around exemption, as for example the cotton ginning and the sugar cane processing industries, shut down for week-end cleaning or repairs or shut down for annual repair and reconditioning. Yet there is nothing in the language of Sec. 7(c) to suggest that where the processing machinery in such industries is shut down for necessary and indispensable cleaning and repairs the exemption should be forfeited.

Thus, the language of Sec. 7(c) fully embraces all the employees under consideration including those engaged in repair work for the mill during the week-end or annual reconditioning periods. All of this goes into the processing costs.

³⁸ Cf. Sec. 13(a) (2), where Congress granted an exemption to employees in any "retail or service *establishment*" and also Sec. 12, where Congress forbade the shipment in commerce of any goods produced in an "*establishment*" in which child labor was employed. See *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 615-616.

C. THE LEGISLATIVE HISTORY OF SEC. 7(c) FURTHER SHOWS THAT THE EMPLOYEES OF APPELLANT HELD NON-EXEMPT BY THE DISTRICT COURT UNDER SEC. 7(c) OF THE ACT ARE WITHIN SUCH EXEMPTION.

The Conference Report on the Act stated with respect to Sec. 7(c):

“ . . . (1) *It is made clear that the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap into sugar (but not refined sugar) or into syrup is included within the absolute exemption, (2) the period of weeks for the partial exemption has been increased to 14, and (3) there is included within this partial exemption the first processing within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations*” [Emphasis supplied]. 83 Cong. Rec. 9254.

Moreover, Congressman Ramspeck, one of the House conferees, in discussing the conference bill and report, stated that the intention of the conferees on the sugar cane processing exemption in Sec. 7(c) was “to exempt those who process these agricultural products into sugar”. 83 Cong. Rec. 9266. Obviously the absolute exemption for sugar cane processing includes incidental or functionally necessary facilities directly employed in such processing, including the operation, repairing, cleaning or maintaining of equipment, machinery and facilities used by appellant to produce power for the processing mill.

D. THE CASE LAW ALSO SHOWS THAT THE EMPLOYEES OF APPELLANT HELD NON-EXEMPT BY THE DISTRICT COURT UNDER SEC. 7(c) OF THE ACT SHOULD BE HELD EXEMPT THEREUNDER.

In *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1), discussed *supra* pp. 46-47, the Administrator and the employees conceded that the employees were subject to the exemption provided by Sec. 7(c). The court's discussion showed that it too regarded the employees as exempt under Sec. 7(c), pointing out several times that Sec. 7(c) exempts from the overtime provisions of the Act the processing of

sugar cane into sugar. 117 F. (2d) at pp. 17, 18-19. By this, the court meant that the exemption applied to all employees engaged in transporting sugar cane from the fields to the mill, in processing sugar cane into raw sugar, and in activities incidental and functionally necessary and indispensable to such transportation and processing, since the court had before it employees engaged in all such activities.³⁹

Since appellant's entire integrated operation is engaged in two main things—the cultivation of sugar cane and its processing into raw sugar—the transportation employees are not only exempt under Sec. 13(a)(6) as incident to field operations, but also they are necessarily exempt under Sec. 7(c) as incident to processing operations. See *Collazo v. Gonzalez*, 127 F. (2d) 934, 937-938 (C. C. A. 1).

Some of the exemptions provided by Sec. 7(c), e.g. handling, slaughtering and dressing of livestock, are limited to particular operations in an industry. Others, however—and the processing of sugar cane into raw sugar is one of them—extend to the entire industry. The cases dealing with Sec. 7(c) exemptions recognize this distinction and make it clear that when the particular exemption involved is one that refers to an entire industry, the exemption applies to all operations which are functionally necessary and indispensable to that industry.⁴⁰ Thus, in *Heaburg v. Independent Oil Mill, Inc.*, 46 F. Supp. 751 (W. D. Tenn. 1942) the exemption for processing cottonseed was held to apply to all employees of a cottonseed mill, including watchmen, clerical employees, and employees hand-

³⁹ Accord: *Maisonet v. Central Coloso* (D. P. R. 1942), 6 Labor Cases, Par. 61, 337 where the court stated (p. 63, 930) that Sec. 7(c) contemplates exemption “*in the sugar industry*” [Emphasis supplied]. See also *Vives v. Serrales*, 145 F. (2d) 552, 554 (C. C. A. 1), holding the Sec. 7(c) exemption applicable to an employee working at a sugar mill and engaged in mill boiler work; and *Sotomayor v. Plazuela Sugar Co.* (D. P. R. 1941), 4 Labor Cases, Par. 60, 656, also holding exempt an employee working at a sugar mill.

⁴⁰ The Administrator also has recognized this distinction. See his Opinion Letter dated July 9, 1941 (Appendix “C” herein, *infra*, p. 89), set forth with approval in the *San Joaquin* case discussed in the text, p. 58.

ling and selling bagging and ties, most of which was used to wrap and bind lint cotton, a by-product of the mill's business, but some of which was sold to cotton ginner.

In *Abram v. San Joaquin Cotton Oil Company*, 49 F. Supp. 393 (S. D. Calif. 1943) the employer operated a cottonseed oil plant consisting of several buildings and structures, including a seed storage house, mill, cleaning house, oil tanks, laboratory and others. The processing consisted of delinting, baling the lint, separating the hulls from the kernels, extracting oil, and making cottonseed cake and meal. Oil was shipped out as produced. Laboratory analyses were made while seed was being received and also at different stages of the processing operations. All operations were continuous and were performed simultaneously. The Sec. 7(c) exemption for cottonseed processing was held to apply to laboratory employees analyzing crude cottonseed oil, including some oil from other plants, employees cleaning the oil, employees loading oil into tank cars, truck drivers hauling trash and doing general work, janitors, and employees unloading cottonseed received at the mill. Thus the exemption was applied although all the operations did not take place in the same building.

McComb v. Hunt Foods, Inc., 167 F. (2d) 905, recently decided by this Court, fully supports our contentions. There the exemption for the first processing of fresh fruits was held to apply to a plant engaged in producing apple juice from fresh whole apples of inferior grades and from apple peelings and cores, and producing pomace, i.e., the pulp obtained by extracting juice from the edible and inedible portions of the apples, and drying and sacking the pomace. The court held that the exemption provisions of the Act clearly indicate a deliberate purpose on the part of Congress to exempt certain business operations, including those engaged in processing fruits and grains, and such purpose is to be respected as much as the general purpose of the Act to protect industrial workers.

And in conclusion, this Court, while recognizing that exemption provisions in the Act are to be construed strictly, stated (167 F. (2d) at p. 908):

“We agree with the conclusion of the trial court that the ‘remedial’ provisions apply to activities excepted by the statute to the same degree and in as full measure as those which by their nature were intended to be brought, in their entirety, within the orbit of the statute, if it is made clear by the evidence that the claim of ‘exception’ is supported by adequate proof. In such event the Act is ‘remedial’ as to the activities claimed and proven to be excepted, and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities” [Emphasis supplied].

In *Hendricks v. DiGiorgio Fruit Corp.*, 49 F. Supp. 573 (N. D. Calif. 1943), cited with approval in the *Hunt Foods* case, *supra*, the 14 workweeks exemption per year for the first processing of fresh fruits was held applicable to a winery engaged in making wine. The exemption was held to include the operation of distilling brandy from completely processed wine, when the brandy was to be used solely to fortify the wine being made in the establishment, on the ground that such distilling was work incidental or necessary to the first processing operation, i.e., the making of wine.⁴¹

⁴¹ Other cases, dealing with various exemptions in Sec. 7(c), also fully support our contention that the exemption applies to all the appellant's operations in question. See *McComb v. Musselman Co.*, 37 F. (2d) 918 (C. C. A. 3) (also holds exempt employees engaged in producing dried pomace from apple pulp, the court citing with approval the *Hunt Foods* case, *supra*); *Byus v. Traders Commerce Co.*, 59 F. Supp. 18 (W. D. Okla. 1942) (year around exemption for compressing cotton held applicable to pressers, truck drivers, and handy-men); *Walling v. McCracken County Peach Growers Ass'n.*, 50 F. Supp. 900 (W. D. Ky. 1943) (Sec. 7(c) exemption for fruit packing industry held applicable to all employees of a fruit packing cooperative, including those who placed lids on the baskets in which the fruit was packed, those who labeled and stamped the baskets, clerical and supervisory employees, timekeepers, mechanics and watchmen); *Gordon v. Paducah Ice Mfg. Co.*, 41 F. Supp. 980 (W. D. Ky. 1941) (The exemption for first processing of fresh fruits and vegetables held applicable to employees of an ice manufacturing company who iced refrigerator railroad cars several hours before strawberries, that were shipped to many parts of the country, were placed in such cars); *Shain et al. v. Armour*, 50 F. Supp. 907 (W. D. Ky. 1943) (Sec. 7(c) dairy products exemption held applicable to employees transporting cream to the plant and receiving it on the receiving dock and pasteurizing, testing, and churning cream); *McDaniel v. Clavin* (Calif. App. Ct.), 128

E. THE ADMINISTRATIVE INTERPRETATIONS OF SEC. 7(c) FURTHER SHOW THAT THE EMPLOYEES OF APPELLANT HELD NON-EXEMPT BY THE DISTRICT COURT UNDER SEC. 7(c) OF THE ACT SHOULD BE HELD EXEMPT THEREUNDER.

The Administrator stated in Interpretative Bulletin No. 14 that Sec. 7(c) grants a "complete" exemption from the overtime provisions of the Act to employees "in any place of employment" where their employer is engaged in the processing of sugar cane into raw sugar. ¶¶ 14, 18.

Paragraph 22 of the Bulletin pointed out that the various exemptions provided by Sec. 7(c) are inapplicable to employees outside the "place of employment", but in this connection the Administrator stated that a "'place of employment', although constituting only one establishment, *may contain several buildings in which the exempt operations are performed*" [Emphasis supplied]. Par. 22 further stated that "... truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment' . . ."

Paragraphs 18 and 22 of the Bulletin are set forth in relevant part in Appendix "C" herein, p. 89, *infra*.

The same Bulletin also expressed the view that the Sec. 7(c) exemptions cover only the employees who perform the operations described in Sec. 7(c) or who perform operations so closely associated thereto that they cannot be segregated for practical purposes and whose work is also controlled by the irregular movement of commodities into the establishment. ¶ 23(a). The court below relied on this statement in denying exemption to many of the appellant's activities (R. 431-432). But if irregularity of movement is the criterion for exemption, the court should have denied exemption even to the cane grinding operation itself, since there is nothing irregular about the

P. (2d) 821, *aff'd*. 22 Calif. (2d) 61, 136 P. (2d) 559 (1943) (14 workweeks exemption per year for handling, slaughtering and dressing poultry held applicable to employees picking up poultry at warehouses and delivering same to defendant's poultry plant, making deliveries to defendant's customers, opening cases of frozen poultry, dressing poultry, cleaning the premises, etc.).

movement of sugar cane from the cane fields of appellant to its mill (R. 136, 152, 210, 413). Moreover, whatever the worth of the irregularity of movement test with respect to the seasonal exemptions provided by Sec. 7(c), such test is irrelevant to the question of exemption in the case of any of the year around exemptions provided by that section, such as that accorded the processing of sugar cane into raw sugar.

Furthermore, the court below overlooked the fact that in a press release issued in January, 1943, the Administrator, explaining further the interpretation contained in paragraph 23(a) of Interpretative Bulletin No. 14, stated that in his opinion the Sec. 7(c) exemptions are applicable to the following two groups of employees: (1) those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. 1944-1945 WHMan., p. 574 *et seq.* In explanation of his opinion the Administrator stated that

“When a plant exclusively engages in activities enumerated in [Sec. 7(c)], *all of the employees* of the operator of the plant who work solely in that plant are exempt” [Emphasis supplied]. *Id.*, p. 576.

He further stated that a warehouse located across the street or across a railroad right-of-way from the packing or processing establishment may be considered part of the same place of employment. *Id.*, p. 575.

The Administrator has repeatedly recognized that the Sec. 7(c) exemptions apply to employees engaged in transporting raw materials to the plant and finished products away from it. Necessarily then he has held such employees to be working in the “place of employment”, and he has so declared with respect to employees of a sugar mill. 1944-45 W. H. Man., p. 609. The Administrator has gone further and declared that the handling, labeling and casing operations in a cannery storage place may be considered as performed in the same place of employment as the canning

operation if (a) the storage place where such operations are performed is *in the same county* as the cannery building or *in a contiguous county*, (b) the canned fresh fruits or vegetables are taken directly to the storage place from the cannery building without intermediate storage at any other place, (c) the operations are performed by employees of the canner who work interchangeably at the cannery and storage place or whose performance of the work is directed from the cannery in the same manner as if they performed it in a storage place located within the cannery.⁴²

A fortiori, the various employees here involved come squarely within the two categories of employees whom Sec. 7(c) exempts. *Supra*, p. 61. They either actually perform the sugar cane processing operation or their occupations are a necessary incident to the cane processing operation. All of them work under the direction of the plantation manager (R. 137-138) on premises devoted by the employer to the cane processing operation.

Appendix "C" herein, pp. 90-92, *infra*, sets forth more extensively a number of other interpretations of the Administrator in conformity with the above.

The findings of the court below regarding fire room and power plant operations of appellant (R. 431, 433) are wholly untenable.⁴³ Such operations are simply component parts of the appellant's cane processing operations and take place in the same place of employment as other parts

⁴² Title 29, Ch. V, Code of Federal Regulations, Pt. 780, Subpart A (12 F. R. 7963) § 780.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24, 106.50.

⁴³ In finding that the appellant generates some electricity in a building separate from the mill building, the court flatly contradicted the record (R. 114, 131, 256). The finding that small surplus amounts of electric power are sold to a public utility company must also be rejected as contrary to the record. The record simply shows that because appellant's power system is tied into the system of Hawaiian Electric Company, Ltd., on rare and infrequent occasions, appellant will feed back power into Hawaiian Electric's lines whenever the appellant generates more power than it needs. Power is not fed back into the Hawaiian Electric lines for the purpose of selling same but only because it is a necessary, convenient and economical method of disposing of excess power. To avoid such feeding back would be costly and impractical (R. 193-194).

of the processing operations. As such they fall squarely within the Sec. 7(c) exemption. Even if some of the fire room and power plant operations are related to the field operations rather than to the processing operations of appellant, still the Sec. 7(c) exemption applies, because the fire room and power plant operations are exempt under Sec. 13(a) (6) to the extent that they relate to the field operations. And as the court below held (R. 433, 445) if an employee during a week performs some operations exempt under Section 13(a) (6) and some exempt under Sec. 7(c), the result is that the employee is exempt for that week from the overtime provisions of the Act.⁴⁴

The court below, in its ruling on the fire room and power plant operations, also placed reliance (R. 432) on that part of paragraph 18 of the Administrator's Interpretative Bulletin No. 14 which provides that removing bagasse from the mill, and baling and compressing same are not exempt operations. This part of par. 18 of the Bulletin is completely irrelevant to the facts here. Bagasse is not removed from the mill nor is it baled and compressed. It is burned right in the mill as fuel for the production of power used in performing the various processing operations of appellant (R. 186). Furthermore, such bagasse is burned in a place of employment engaged exclusively in an operation described in Sec. 7(c) and as such comes within the exempt categories of operations listed by the Administrator. *Supra*, p. 61.

Still further, an Opinion of the Wage-Hour Division subsequent to Interpretative Bulletin No. 14 has stated that the removal of beet pulp residue from a sugar beet mill would be considered a necessary incident to the production of sugar and hence within the Sec. 7(c) exemption for the processing of sugar beets into sugar or syrup. 1944-45 WHMan., pp. 610-611. It follows that the use of cane residue; i.e. bagasse, as fuel for the production of power for use in performing the various processing operations, and

⁴⁴ The fire room and power plant operations which are related to the plantation village operations are discussed *infra* pp. 79-80, footnote 57.

the repair and maintenance of equipment used in the mill to burn such bagasse, are likewise a necessary incident to sugar cane processing operations and therefore also within the exemption.

F. THE EXEMPTION PROVIDED IN SEC. 7(c) IS NOT LOST WHEN WORK IS PERFORMED WHILE THE MILL IS SHUT DOWN (1) FOR WEEK-END REPAIR AND CLEANING, OR (2) FOR THE ANNUAL PERIOD OF REPAIR AND RECONDITIONING.

1. *Week-end repair and cleaning.* Repairs are also made during the course of the week, such repairs being of the same general nature as the repairs made on the week-end (R. 184, 340-341). Even appellees' witness, Mr. Hall, admitted that it is the practice in Hawaii for sugar plantations to shut down their operations each week for the purpose of cleaning and making repairs, that such shutdown is necessary, and that repairs are also made during the week (R. 328-329). Such repairs are therefore a necessary incident to the effective conduct of the mill's processing operations. The record also shows, and the court so found (R. 434), that even on the week-end, sugar remains in process and occasionally some raw sugar is dried (R. 338, 356, 357).

The court below held that week-end cleaning and repair are not exempt under Section 7(c) and also held that in any workweek in which an employee performs some work during such shutdown period, the Sec. 7(c) exemption is inapplicable to him, notwithstanding that his work the rest of the week comes within such exemption (R. 434-435, 444).

The court's holding is of course unsound. Most of the employees, who work in the mill on weekend cleaning and repair, also work in the mill during the rest of the week when cane grinding is conducted, for weekend repairs require 35 percent to 60 percent of all mill employees (R. 184, 238-239, 339-340). If such employees are doing non-exempt work on the weekend, they lose the exemption for the entire week according to the court's holding. Such holding, therefore, proves too much, for it would destroy the exemption entirely for these employees, notwithstand-

ing that the Record shows that such weekend repairs are necessary to continue the mill's operations (R. 183-184, 329, 338-339). It is impossible for the appellant to hire a separate crew of workers just to perform the weekend repairs, and since such repairs are necessary, appellant must use the available employees. If in so doing appellant loses the exemption for such employees, then the Sec. 7(c) exemption is read out of the Act so far as appellant is concerned. Congress never could have intended such an absurd result.

The above views appear to be in accord with those of the Administrator, who apparently does not believe that the exemption is lost to an employee in any workweek in which he both engages in the processing operation and also performs some work on the weekend when the processing operation is closed down. See 1944-45 WHManual, pp. 612-613.

2. *Annual repair and reconditioning.* We submit that, contrary to appellees' contention and the holding of the court below (R. 433-435, 444), the Sec 7(c) exemption must be regarded as applicable to necessary repair work and all other work incidental to and functionally necessary and indispensable to the processing of sugar cane into raw sugar, the year around and not only during the grinding season.

Unlike certain other exemptions granted by Sec. 7(c), which are limited to fourteen workweeks in a calendar year, the exemption granted the processing of sugar cane is a year-around one without limitation. *Supra*, p. 55. This exemption therefore cannot be said to be a seasonal one. Nor is the industry in Hawaii, which is engaged in processing sugar cane into raw sugar, in fact a seasonal one (R. 136, 152, 210, 212, 413). Congress must be presumed to have known these simple facts about sugar cane production and processing in Hawaii. In view of such facts and since Congress did not see fit to limit the exemption only to the period of the year when the mill is in operation, the exemption should not be construed as so limited.

The off-season work is simply necessary repair and reconditioning work required to permit the mill to continue

operating. Just as such work is necessary to the production of raw sugar for commerce, so it is part of the processing operation and partakes of the exemption granted to processing.

The language of Sec. 7(c) refutes the findings of the District Court that in order for the exemption to apply the employees as well as the employer must, at the time, be engaged in the processing and that "it is not enough that the employer be merely established in the business of processing" (R. 434). *Sec. 7(c) grants exemption to an employer with respect to his employees "in any place of employment" where the employer is engaged in processing sugar cane into sugar or syrup. The words "place of employment" are the controlling words in the exemptive provision. So long as the "place of employment" is one where the employer processes sugar cane into raw sugar as the appellant does here, the exemption applies. There is no basis for inserting into the exemptive provision the qualification against off-season work since such work also takes place in the prescribed "place of employment". Accordingly it too must be deemed to fall within the exemption.*

The above thesis is fully borne out by an examination of the legislative history of Sec. 7(c), which shows (*supra*, p. 56) that the exemption for *processing of sugar cane* was intended to be "entire" and "absolute", unlike the partial (14 workweeks per year) exemption for the first processing of fresh fruits and vegetables and the processing of certain other agricultural commodities. But if an exemption is to be denied to the sugar cane processing operations during the off-season—a season motivated simply by the necessity of making repairs—then the exemption can hardly be deemed "absolute" or "entire".

The case of *McComb v. Consolidated Fisheries Co.*, 75 F. Supp. 798 (D. Del. 1948), discussed *supra*, p. 42, is in point. There it was held that the Sec. 13(a) (5) fisheries exemption in the Act applies to the cleaning of machines in a fish processing plant and the repair of the plant itself dur-

ing the off-season. The court said that such maintenance and repair work were impossible while the fish processing was being done and therefore had to be done while no fish were being caught and brought to the plant. Hence the repair work was an integral and essential part of the processing and marketing of the fish products and by-products. This reasoning is in point here (R. 210-213). The court below denied the authority of the *Consolidated Fisheries* case on the ground that there was no shutdown season there, since some 200 tons of fish scrap were processed during the time that no fish were brought to the plant (R. 435). The court in that case, however, did not rest its decision on that ground, but rather on the basis already stated above.

Clearly distinguishable is *Maisonet v. Central Coloso* (D. P. R. 1942), 6 Labor Cases, par. 61,337, where the court held the exemption inapplicable to a sugar processing mill in Puerto Rico during the off-season, in a case where the operating season was only six months long. The operation of sugar mills in Puerto Rico is seasonal (*Bowie v. Gonzalez*, 117 F. (2d) 11, 14), the shutdown being caused because sugar cane is grown there for only part of the year. This differs completely from the case in Hawaii where the grinding season is limited only by the needs of mill maintenance. See statement to this effect by the union here involved (Appendix "D" herein, p. 93, *infra*) to the Senate Committee on Education and Labor which was considering amendments to the Fair Labor Standards Act.

The court in the *Maisonet* case also relied heavily upon the fact that the number of employees during the off-season was considerably smaller than during the grinding season. Thus, said the court, if no overtime were worked during the off-season, the purpose of the Act of spreading employment among a large number of workers would be achieved. Here, however, *the facts are that the average number of man days of work performed in the mill during each 24 hour period during the off-season is 116—and that is precisely the same as the average number of man days of work performed in*

*the mill during each 24 hour period during the grinding season (R. 214-215).*⁴⁵

III.

ANY EMPLOYEE APPELLEE, WHO IN A WORKWEEK PERFORMS SOME WORK WHICH IS EXEMPT UNDER SEC. 13(a)(6) OR SEC. 7(c) AND DOES NOT ENGAGE FOR ANY SUBSTANTIAL PART OF HIS TIME IN THE SAME WORKWEEK IN AN ACTIVITY WHICH IS NOT SO EXEMPT, IS EXEMPT FOR THAT WORKWEEK FROM THE OVERTIME PROVISIONS OF THE ACT.

We have contended above that all the work performed by the appellant's employees is exempt under either Sec. 13(a)(6) or Sec. 7(c). But if this court is of the view that some of the activities of the appellees are not exempt under Sec. 13(a)(6) or Sec. 7(c), it becomes material to ascertain the extent to which an employee may engage in non-exempt work in a workweek without losing the exemption otherwise applicable to him during that workweek.

The court below evidently took the position that an employee whose other work in a workweek is exempt under Sec. 13(a)(6) or Sec. 7(c) may lose the exemption for the entire week if he devotes as much as 10 or 20 minutes in the week to a non-exempt activity (R. 432-433, 436, 437, 445). We submit that this ruling is unnecessarily harsh and renders meaningless for all practical purposes the ex-

⁴⁵ While the Administrator has taken the position that off-season work is nonexempt, such position is difficult to reconcile with statements made by him and the Secretary of Labor to Congressional committees. Thus, in a statement filed with the Senate Committee on Labor and Public Welfare, the Administrator referred to the year-around exemptions in Section 7(c) as "52-week overtime exemption[s]". *Hearings on S. 2386 and other bills*, 80th Cong., 2nd Sess., p. 107. And Secretary of Labor Schwellenbach, in a sectional analysis of S. 2386, advised the Committee as follows:

"At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking *all employees* employed in that establishment are exempt from the overtime provisions of the act *for either the entire year or 14 weeks a year*, depending on the particular activities involved. This includes office, custodial and maintenance employees". *Id.*, p. 183 [Emphasis supplied].

emptions provided by Sec. 13(a)(6) and Sec. 7(c). On most farms there is no such thing as the complete segregation of employees and activities. An employee will perform whatever duties are necessary to the farm's operations. But if the agricultural exemption in the Act is to be narrowly construed so that many activities performed on the farm are to be deemed non-exempt, then under the ruling of the court below the agricultural exemption is of no avail to the farmer. The court's ruling means that in performing the operations necessary and indispensable to farming, the exemption is lost. And the same result follows with respect to the processing exemption provided by Sec. 7(c).

We submit, therefore, that Congress intended the exemption to apply to an employee in any workweek in which he does not devote a *substantial part* of his time to an activity not exempt under Sec. 13(a)(6) or Sec. 7(c). This rule takes cognizance of the realities of a farmer's or processor's operations. Moreover, it comports with the rules laid down by the Administrator with respect to many other exemption provisions in the Act. In the case of the exemptions for executives, professionals, local retailing capacity employees and outside salesmen; retail establishments; seamen; carriers by air; fishery employees; local newspapers; street and suburban railways and local trolley and motor bus operators; switchboard operators; and employees of employers subject to Part I of the Interstate Commerce Act, the Administrator has permitted a tolerance of nonexempt work ranging from 20% to 49.999%. In the case of all but the exemptions for executives, professionals, local retailing capacity employees, outside salesmen and local newspapers, the Administrator has specifically said that these percentages of nonexempt work are insubstantial. The Administrator's rulings concerning these several exemptions are detailed in Appendix "E" herein, pp. 94-95, *infra*.

The reason for allowing a tolerance of nonexempt work in the case of exemptions is that many employees in occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties

which do not strictly fall within the literal language of the exemption provisions. A failure to allow some tolerance therefore would result in so widespread a denial of the exemption provisions as to substantially defeat the Congressional intention in enacting them. This reason applies equally to the Sections 13(a)(6) and 7(c) exemptions. In view of the legislative history of such exemptions, which we have previously reviewed, showing the breadth that Congress intended to accord them, a denial of the tolerance is without justification and defeats the exemptions granted by Congress.

The Supreme Court has had occasion to consider the problem of exempt and non-exempt work performed in the same workweek only in the case of the exemption provided by Sec. 13(b)(1) of the Act for interstate motor carriers. The court ruled that if the duties of the job performed by the employee are such that he is called upon in the ordinary course of his work to perform, either regularly or from time to time, safety affecting activities, he is exempt under Sec. 13(b)(1) in all workweeks when he is employed at such job regardless of the proportion of his time and activity actually devoted to safety affecting work. *Morris v. McComb*, 332 U. S. 422, 434-435. See too *Pyramid Motor Freight Corp. v. Ispass*, 330 U. S. 695, 707-709; *Levinson v. Spector*, 330 U. S. 649, 675-676, 679 *et seq.*; and the Administrator's statement on the scope of the Sec. 13(b)(1) exemption, Title 29, Ch. V, Code of Fed. Reg., Pt. 782 (13 F. R. 2346) Sec. 782.2; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,108.02. It is apparent that this court need not go nearly as far as the Supreme Court went with respect to the Sec. 13(b)(1) exemption in order to adopt appellant's position herein.

Furthermore, the Supreme Court has made it clear that in order to be included in the Act in the first instance, a substantial part of an employee's activities must be devoted to interstate commerce or the production of goods for interstate commerce.⁴⁶ Several Courts of Appeals,

⁴⁶ *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572; *Mabee v. White Plains Publishing Co.*, 327 U. S. 178, 184-185.

including this Court, have had occasion to apply this rule laid down by the Supreme Court.⁴⁷ In a case dealing with the 25% nonexempt work tolerance allowed by the Administrator under the retail establishment exemption provided by Sec. 13(a)(2) of the Act, the Court of Appeals for the Eighth Circuit said that substantiality has always been the general legal test for bringing the Fair Labor Standards Act into play, in its various aspects, to its fullest reach. *Northwestern Hanna Fuel Co. v. McComb*, 166 F. (2d) 932, 937.

If, therefore, an insubstantial amount of engagement in commerce or the production of goods for commerce are insufficient to subject an employee to the Act, it follows that an insubstantial amount of nonexempt work should not defeat the application of an exemption otherwise applicable to him. As this court has said, the "remedial" provisions of the Act apply to exemptions to the same degree as to covered activities.⁴⁸

IV.

THE EMPLOYEE APPELLEES, WHEN REPAIRING AND MAINTAINING APPELLANT'S HOUSES AND RELATED DOMESTIC FACILITIES, ARE NOT "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE" AND THEREFORE THE PROVISIONS OF THE ACT DO NOT APPLY TO SAID EMPLOYEES; BUT EVEN IF THEY ARE SO ENGAGED, THEY ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SEC. 13(a)(6) AND SEC. 7(c).

A. DESCRIPTION OF OPERATIONS.

Among the specific duties of the employees of appellant, who render services and perform maintenance work on the

⁴⁷ *Southern California Freight Lines v. McKeown*, 148 F. (2d) 890, 891-892 (C. C. A. 9) *cert den.* 326 U. S. 736 *reh'g den.* 326 U. S. 808; *Skidmore v. Casale*, 160 F. (2d) 527, 530 (C. C. A. 2); *Hertz Drivurself Stations, Inc. v. U. S.*, 150 F. (2d) 923, 926-927 (C. C. A. 8).

⁴⁸ *McComb v. Hunt Foods*, *supra*, pp. 58-59.

appellant's houses and village areas (R. 221), are repairing houses (R. 233); painting houses (R. 250); cleaning plantation villages (R. 254); pruning shade trees located around plantation houses and cutting fire wood for use as fuel by employees living in the plantation houses (R. 233); and painting gymnasiums and clubhouses (R. 250). The employees doing this work will hereinafter be referred to as village maintenance employees.

B. THE VILLAGE MAINTENANCE EMPLOYEES ARE NOT "ENGAGED IN [INTERSTATE] COMMERCE".

The test under the Act to determine whether an employee is engaged in interstate commerce,⁴⁹ "is not whether [his] activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it". *McLeod v. Threlkeld*, 319 U. S. 491, 497. The test is narrow and exacting. See *Armour v. Wantock*, 323 U. S. 126, 131.

The only activities of the appellant which may be regarded as "in [interstate] commerce" are the shipment of raw sugar from Hawaii to the mainland and perhaps the receipt of some materials from the mainland. The village maintenance employees are so far removed from any such activities that plainly their work cannot be considered a part of it. *10 E. 40th Street Building, Inc. v. Callus*, 325 U. S. 578, 581; *McLeod v. Threlkeld*, 319 U. S. 491; *Rosenberg v. Semeria*, 137 F. (2d) 742 (C.C.A. 9), cert. den. 320 U. S. 770. See also *Stoike v. First National Bank*, 290 N. Y. 195, 48 N. E. (2d) 482, 485, cert. den. 320 U. S. 726; *Convey v. Omaha National Bank*, 140 F. (2d) 640, 641-642 (C. C. A. 8), cert. den. 321 U. S. 781.

⁴⁹ "Commerce" is defined in Sec. 3(b) of the Act as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

C. THE VILLAGE MAINTENANCE EMPLOYEES ARE NOT "ENGAGED . . . IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE".

By definition in the Act, an employee is deemed engaged in the production of goods if such employee is employed in "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Sec. 3(j)):

Activities are "necessary to the production" of goods when they bear a "close and immediate tie with the process of production" for interstate commerce, and not simply a "tenuous relation" to such process. See *Kirschbaum v. Walling*, 316 U. S. 517, 525. And in applying this standard, the Supreme Court has emphasized that Congress in enacting this statute "plainly indicated its purpose to leave local business to the protection of the States", *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570; *Higgins v. Carr Bros. Co.*, 317 U. S. 572, 574,⁵⁰ and "did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act . . . and the National Labor Relations Act . . . to exhaust its constitutional power over commerce". *10 East 40th Street Bldg. Inc. v. Callus*, 325 U. S. 578, 579; *McLeod v. Threlkeld*, 319 U. S. 491, 493.

All the cases under the Act involving employees doing work akin to that of the village maintenance employees herein have excluded them from coverage. In *Wilson v. R. F. C.*, 158 F. (2d) 564 (C. C. A. 5), *cert. den.* 331 U. S. 810, Dow Magnesium Corporation and Dow Chemical Company had built and operated plants for producing magnesium and styrene, respectively. The magnesium and styrene

⁵⁰ S. Rep. 884, Committee on Education and Labor, 75th Cong., 1st Sess. p. 5. "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce."

were shipped in interstate commerce. Near the location of the two plants, Defense Plant Corporation acquired a 400 acre tract of land and constructed about 2,000 dwelling houses thereon. Employees of the above two plants were the main occupants of the houses. Plaintiffs worked for Defense Plant as firemen and guards of the 400 acre tract of land and the property thereon, and as operators of the plant furnishing water service to such tract. All such employees were held not covered, the court stressing that their "*services benefited the housing occupants not when they were producing goods for commerce but when they were entirely separated from the production of goods for commerce*" [Emphasis supplied].

Morris v. Beaumont Mfg. Co., (W. D. S. C. 1947), 12 Labor Cases, par. 63,687, is even closer on the facts. Defendant there operated a textile manufacturing plant where it manufactured cotton textiles for interstate commerce. In addition it owned about 280 residences in the City of Spartansburg, rented primarily to its employees (of about 1100 employees, about 490 occupied the residences). The residences were within a radius of one-half mile of the manufacturing plant and were located on city streets, where they were interspersed with other dwellings not owned by the defendant. Occupancy of the residences was optional with the employees. Plaintiffs were painters or carpenters who in some workweeks were engaged exclusively in constructing, maintaining or repairing the residences. The court held that the plaintiffs were not engaged in the production of goods for commerce and pointed out that the Wage-Hour Division had ruled that the defendant had complied with the Act.⁵¹ It said that the residences upon which the plaintiffs worked were in no sense devoted to manufacture for commerce and nothing was done therein to promote the production of goods for commerce. None

⁵¹ Prior to this time the Administrator, in reply to inquiries, had merely stated that he was not prepared to express an opinion as to the coverage under the Act of employees repairing and maintaining houses owned by their employer and occupied as residences by other employees who were engaged in the employer's plant in producing goods for commerce (1944-45 WHMan., p. 97).

of defendant's business activities was attended to, carried on, or considered in the residences.

The problem is essentially one of degree as to the number of "steps removed from the physical process of the production of goods" for interstate movement. *10 East 40th Street Bldg., Inc., v. Callus*, 325 U. S. 578, 583. Three factors in particular place these village maintenance employees beyond the scope of the Act.

First, they are not engaged on the site of whatever production is in process on the plantation, whether of cane or raw sugar, but rather do their work in a mill village physically separated from such production. Such remoteness from the physical production process is "a relevant factor in drawing the line". *Id.*

Second, they work on homes the occupancy of which is optional with the production employees, including each employee appellee herein (R. 221). The employees can live anywhere they choose, whether on or off the plantation, and the plantation operations are not any more efficient because the employees do live on the plantation. In fact, some of the employees live off the plantation (R. 222).

Third, the village maintenance employees are employed on houses and facilities which are not themselves produced for or shipped in interstate commerce, nor are they used in or devoted to the production of goods for interstate commerce. They merely "serve the needs" of the employees, as the parties stipulated (R. 219), when their occupants are *not* engaged in such production at all, but are wholly separated therefrom in space and function. Such services are as remote from production for commerce as if provided in a village not owned by the appellant.

The village maintenance work here involved is therefore far removed from activities held "necessary to" production of goods for commerce in such cases as *Kirschbaum Co. v. Walling*, 316 U. S. 517 and *Borden Co. v. Borella*, 325 U. S. 679. Such village maintenance employees are likewise further removed from production for commerce than the maintenance employees of an operator of a 48-story office building in New York, held excluded from coverage in *10*

East 40th St. Bldg., Inc. v. Callus, et al., 325 U. S. 578, although the maintenance employees there involved actually furnished services to facilitate the operations of the tenants' businesses during office hours. Here, however, the employees are merely satisfying personal needs of employees viewed as a part of the general consuming public and not merely as employees. The village is really a municipality with all the physical characteristics of one and containing the usual buildings and establishments found in a municipality. Cf. *Marsh v. Alabama*, 326 U. S. 501, 502, 508, 510. Indeed, there reside in the village not only employees of the appellant, but also others who may or may not work in establishments which produce goods for commerce.

An occupation is not within the scope of the Fair Labor Standards Act merely because it is indispensable to the production of goods "in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods". *10 East 40th St. Bldg., Inc. v. Callus*, 325 U. S. 578, 582. Otherwise, any work, no matter how essentially local in nature, would come under the Fair Labor Standards Act.⁵² The services in question here are "insulated from the . . . Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act", *10 East 40th St. Bldg., Inc. v. Callus*, 325 U. S. 578, 583, but to leave them "to the regulatory power of the States" *Id.* p. 583. In this case in fact the Territorial Legislature of Hawaii has imposed its own wage and hour requirements with respect to such services.⁵³

⁵² Thus there is just as much reason for holding persons engaged in repairing houses at Haleiwa to be engaged in the production of goods for commerce as there is for so holding at Waialua, since the tenants at Haleiwa also make their living by producing goods for interstate commerce.

⁵³ Revised Laws of Hawaii, 1935, Ch. 259-c, Title XXVI, as amended.

D. IF THE VILLAGE MAINTENANCE EMPLOYEES ARE ENGAGED "IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE," THEY ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SEC. 13(a)(6) OR OF SEC. 7(c) .

If the court should find, notwithstanding our previous argument, that the village maintenance employees are engaged in interstate commerce or in the production of goods for interstate commerce, then we submit that the overtime provisions of the Act do not apply to them since that very finding brings them within the Sec. 13(a) (6) or the Sec. 7(c) exemptions under the circumstances of this case. Activities so related to agriculture and processing that they are in commerce or necessary for the production of goods for commerce, must necessarily be so sufficiently related to such activities as to share in the exemptions provided for cultivation or processing or both. Thus:

1. To the extent that the work of the village maintenance employees relates to employees of appellant who are within the Sec. 13(a) (6) exemption, they are in the same position as any other employees performing work necessary and indispensable to agricultural operations; or in the Administrator's language, they are doing work 'in connection with the activities described in the definition of 'agriculture' contained in Sec. 3(f)' and are therefore exempt.⁵⁴

Moreover, to the extent that the village maintenance employees are engaged in cutting wood for use as fuel by the appellant's employees living in the plantation villages (e.g. R. 225, 226, 229-230, 231) they are engaged in "(. . . Forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations", as these words are used in the statutory definition of "agriculture". "Forestry or lumbering operations", as used in Section 3(f), include the cultivation and management of forests, felling and trimming of timber, cutting and hauling of timber, lumber, and like

⁵⁴ See Interpretative Bulletin No. 14, ¶12, discussed *supra* at p. 50.

products, sawing the logs into lumber or the conversion of logs into ties, posts, and similar products.⁵⁵ Surely if the exemption for "agriculture" may include these commercial forestry and lumbering operations when performed by a farmer or on a farm, it also includes the completely non-commercial operations involved here of cutting firewood for use as fuel by the appellant's employees living in the plantation villages.⁵⁶

2. As for the work of the village maintenance employees which relates to employees who are within the Section 7(c) exemption, such work likewise falls within such exemption. The Administrator has said that the Sec. 7(c) exemption applies not only to those employees processing sugar cane but also to those employees whose operations are "a necessary incident" to sugar cane processing and who work in those portions of the premises devoted to sugar cane processing. If the village maintenance employees are deemed necessary to the production of raw sugar for commerce, by the same token their operations are "a necessary incident" to the operation of processing sugar cane.

Moreover, since these operations are such "a necessary incident" to the processing of sugar cane, the employees must be regarded as working at the "place of employment" where processing is performed. The term "place of employment", as used in Sec. 7(c) of the Act, must mean the entire premises on which are located all the buildings required in the processing of sugar cane. *Supra*, pp. 54-55. If the operations here discussed are necessary to the production of raw sugar for interstate commerce, then the

⁵⁵ See par. 1 of Interpretative Bulletin No. 7 issued by the Wage and Hour Division, U. S. Department of Labor in February, 1939 (3 CCH Labor Law Reporter (4th ed.), Par. 24481) and Sec. 780.61 of the Division's statement on forestry and lumbering operations incident to or in conjunction with farming operations, appearing in the Code of Federal Regulations, Chapter V, Title 29, Part 780, Subpart B (12 F. R. 5961) (3 CCH Labor Law Reporter (4th ed.) par. 24106.61).

⁵⁶ Such wood cutting operations are of course "incident to" or "in conjunction with" the appellant's farming operations. See the discussion on pp. 26-28, *supra*, as to the meaning of "incident to" and "in conjunction with" as used in Section 3(f).

buildings in or about which such operations take place, including the dwelling houses, are required in the processing of sugar cane and must be considered part of the same "place of employment" as the mill and functionally related buildings.

3. If the work of the village maintenance employees relates partly to employees exempt under Sec. 13(a)(6) and partly to employees exempt under Sec. 7(c), they are obviously exempt from the overtime provisions of the Act.

E. ANY EMPLOYEE APPELLEE, WHO IN THE SAME WORKWEEK PERFORMS SOME WORK THAT IS NOT WITHIN THE COVERAGE OF THE ACT AND OTHER WORK WHICH IS EXEMPT UNDER EITHER SEC. 13(a)(6) OR SEC. 7(c), IS EXEMPT DURING SUCH WORKWEEK FROM THE OVERTIME PROVISIONS OF THE ACT.

Some of the employees we are presently considering, as for example employees in the paint shop, the plumbing shop and the carpentry shop, do work in the same workweeks with respect to the plantation houses and also with respect to the field and mill equipment of the appellant (e.g. R. 202-203, 249, 254-255). Their work on the houses is not covered by the Act at all, while the work on the field and mill equipment is exempt under either Sec. 13(a)(6) or Sec. 7(c). In such situation, where in the same workweeks they are performing both work that is not sufficiently close to commerce or to the production of goods for commerce to be considered covered by the Act at all, and work that is exempt under Sec. 13(a)(6) or Sec. 7(c), they are obviously excluded from the overtime provisions of the Act.⁵⁷ The

⁵⁷ *Fitzgerald v. Kroger Grocery*, 45 F. Supp. 812 (D. Kans. 1942) holding exempt from the overtime provisions under Sec. 13(b)(1) employees who in the same workweeks were engaged in driving trucks in interstate commerce—an activity exempt under Sec. 13(b)(1)—and other driving which was wholly in intrastate commerce and hence not covered by the Act at all.

The same principle applies to the employees working in the power plant of the mill. Power there produced is used in the field and mill operations of the appellant and the employees are thereby entitled to a Sec. 13(a)(6) or Sec. 7(c) exemption. Power is also

Administrator is in accord. 1944-45 WHMan. p. 608 and 2 C. C. H. Labor Law Service ¶ 33,083. The court below also appears to share this view, since it held that an employee engaged in activities, some of which are exempt under Sec. 13(a)(6) and the remainder of which are exempt under Sec. 7(c), is exempt (R. 433,445).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that Parts I, III, IV, V, and VI of the judgment below should be reversed.

Respectfully submitted,

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distributed in the same workweeks to the plantation villages and to some non-plantation users, but none of such power is used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce nor is it transmitted into interstate commerce (R. 191-193). The power plant employees are thus in the same workweeks doing some work exempt under Sec. 13(a)(6) or Sec. 7(c) and other work not covered by the Act at all. As explained in the text, they are therefore excluded from the overtime provisions of the Act during such workweeks.

APPENDIX A.

Legislative History of Secs. 13(a)(6) and 7(c).

1. *Senator Black's statement opening debate in the Senate on S. 2475.*

"We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture." 81 Cong. Rec. 7648.

2. *Statement of Senator Schwollenbach that packing by a farmer of his own grown apples was exempt under the bill.*

"When an apple grower picks his apples and takes them into his own warehouse . . . and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is *no dispute about the fact that it is an agricultural operation*. . . . It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm. . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes" [Emphasis supplied] 81 Cong. Rec. 7659. To get at the situation about which he was complaining, Senator Schwollenbach later introduced an amendment to provide an exemption for persons employed within the area of production "in preparing, packing, or storing . . . fresh fruits or vegetables in their raw or natural state" (*Id.*, p. 7876). This amendment was adopted (*Id.*, p. 7949).

3. *Debate in Senate on processing of sugar cane.*

"Mr. Overton. Let me invite the attention of the Senator to another agricultural industry in connection with which the processing, if it may be so called, by the farmer of his own product is much more general than in the case of the farmer ginning his own cotton. I refer to the sirup-cane producer who processes his

own cane, grinds it, and makes it into sirup. Does he come within the provisions of the bill?

* * * * *

“Mr. Black. The Senator can read the definition in *the bill and note that those things ordinarily done by farmers on the farm do not come under the provisions of the bill.*

“Mr. Pepper. Mr. President, I wonder if the following language would not answer the questions of the Senator from Louisiana. It is found on page 51 of the bill, lines 13 and 14, being a part of the agricultural definition: ‘And any practices ordinarily performed by a farmer as an incident to such farming operations.’

“Mr. Overton. It may and it may not. I was asking the Senator from Alabama because he is the author of the bill, and I was giving a concrete case . . . I have taken the case of a farmer who *plants his sugarcane, gathers it, and who on his own farm has a sirup mill and converts the juice of the cane into sirup. Does he come within the provisions of the bill?*

“Mr. Black. *The definition provides that those things done by the farmer ordinarily on his farm constitute a part of his farming business. It would depend upon whether or not that was an ordinary incident to that type of farming business in the State where sirup is made. If so, that would be agriculture under the definition of the bill.*

* * * * *

“Mr. Overton. It would not be considered an ordinary practice performed by a farmer as an incident to his farming operations for the reason that we also have large sirup mills. Such sirup mills gather in the cane produced by the different farmers and process it into sirup. But it is of frequent occurrence that a farmer has a mill on his own farm and converts his own cane juice into sirup. With that explanation, would the Senator say the practice of such a farmer is one ordinarily performed by a farmer as an incident to his farming operations?

“Mr. Black. If the Senator says it is a practice not ordinarily performed by a farmer as incident to his farming operations, I would necessarily say it was a practice not ordinarily performed by a farmer as incident to his farming operations, and therefore would

not come under the definition. I am assuming it is a practice which is not ordinarily engaged in, by farmers.

"Mr. Overton. Not altogether engaged in, but frequently engaged in by farmers.

"Mr. Black. For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them through the United States. Since that is a practice not ordinarily engaged in by farmers on their farms, naturally that would not be considered a farming activity.

"Mr. Overton. *Let us take the sugar manufacturer. On some plantations there are mills in which the planters may manufacture their own cane into sugar. Would they come within the provision of the bill?*

"Mr. Black. *As I said, it would depend upon whether or not that comes within the definition under the facts of operation, whether it is a necessary incident to that type of cane farming . . .*

* * * * *

"Mr. Overton. As I understand the Senator, in cases where some farmers process their own products and other farmers carry their products to some processor to be processed, then by reason of the fact that some farmers carry their products to a processor to be processed, the farmers who process their own products would not be considered as engaging in a practice which is ordinarily incident to farming operations.

"Mr. Black. I could not say as to that. It depends altogether on the facts as to what is a necessary incident to farming. As I said, there are some things so far removed from farming that all of us would know instantly they did not constitute a farming operation. The illustration I gave was of a farmer erecting on his farm a factory and manufacturing anything you please, whether something he grows or not, who employs many people to manufacture it, and then ships it in interstate commerce. The mere fact that he has such a plant on his farm would not make the manufacturing of shirts, for instance, a farming operation. It would still be a manufacturing operation. The same reasoning would apply to any other process of manufacturing" [Emphasis supplied]. 81 Cong. Rec. 7657-7658.

4. *Debate on Senator McGill's amendment to provide that the agricultural exemption should apply (1) to practices performed on a farm as an incident to farming operations and (2) to "delivery to market."*

"Mr. McGill. Mr. President, the purpose of the amendment is to broaden the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. *Likewise, those who are engaged in harvesting and delivering to market might be included.* It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

* * * * *

"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and *deliver it to market.*

"Mr. George. Would the amendment also *apply to the harvesting of any other crop?*

"Mr. McGill. *It would apply to any commodity produced on a farm.*

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. *And who move peanuts to the market?*

"Mr. McGill. *Yes; that is my understanding.*

"Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

"Mr. Black. *That is my interpretation of the amendment,* and is it my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama,

the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

“Mr. Black. *Unquestionably.*

“Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, *so long as it is incidental to agricultural purposes.*

“Mr. George. *And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.* Is that true?

“Mr. McGill. *That is true; and the language would also include all labor performed in making delivery to market.*

“Mr. George. I thank the Senator .

“Mr. Copeland. Of course, that would take care of my apple man, about whom I have been worrying, would it not? *It would take care of the farmer who takes his crop of apples to the market, would it not?*

“Mr. McGill. That is correct. [Emphasis supplied]. 81 Cong. Rec. 7888.

5. *Debate on amendment proposed by Senator McAdoo.*

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

“Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits.” 81 Cong. Rec. 7927.

The following discussion ensued:

“Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator’s amendment applies by inserting in line 13, after the word ‘farmer,’ the words ‘or on a farm,’ and also by inserting in line 14, after the word ‘operations,’ the words ‘includ-

ing delivery to market,' *it being the purpose of these amendments to exclude from the bill all labor performed on a farm, whether by contract with the farmer or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm. . . .*

* * * * *

" . . . I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. *The amendment adopted yesterday was intended to include, and, I think, it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products to market.* In my judgment it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms carried in it, will be rejected.

"Mr. George. I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emphasis supplied]. *Id.*, pp. 7927, 7928-7929.

6. *Debate on Conference Report between Senator Thomas and Senator Johnson.*

“Mr. Johnson of California. *I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.*

“Mr. Thomas of Utah. I could not hear part of the Senator’s sentence.

“Mr. Johnson of California. *I said that, in general language, agriculture is exempted from the operation of the bill.*

“Mr. Thomas of Utah. *It is.*

“Mr. Johnson of California. *Does the Senator know of any particular kind of agriculture that is included in the bill?*

“Mr. Thomas of Utah. *I do not know of any. The definition seems to be all-inclusive, and we tried to make it so*” [Emphasis supplied]. 83 Cong. Rec. 9162-9163.

APPENDIX B.**Administrator's Interpretation of Section 3(f) With
Respect to a Farmer's Irrigation Operations.**

“At the present time the Administrator, by interpretation, has considered exempt under the 13(a)(6) exemption as engaged in agriculture, those employees of irrigation companies who are engaged exclusively *on* a farm or farms in furnishing water used solely for irrigation purposes thereon, and also those employees who may be engaged off a farm in activities concerned solely with the application of water to *particular* farms, as in operating the last head gate for diverting or distributing water to a particular farm. On the other hand, employees engaged in the general distribution of water, whose work is not confined to the application of water directly to individual farms, have not been considered to fall within the 13(a)(6) exemption as engaged in agriculture”. *Hearings on S. 2386 and other bills*, Committee on Labor and Public Welfare, 80th Cong. 2nd Sess., p. 170 (sectional analysis of S. 2386 submitted by Secretary of Labor Schwollenbach).

APPENDIX C.

Administrator's Interpretations of Section 7(c).

1. *Distinction drawn between Sec. 7(c) exemptions referring to an entire industry and Sec. 7(c) exemptions referring to particular operations in an industry.*

“The exemption thus granted to cottonseed processing differs from that granted in the same section of the Act to certain operations upon livestock. The latter exemption appears limited to certain particular operations, since Sec. 7(c) does not use any term descriptive of the meat packing industry, but uses only words describing certain particular operations in such industry. With this distinction in mind *it appears to us that all employees working in a plant engaged in processing cottonseed are within the exemption*, while this would not be true of all employees working in a plant engaged in handling, slaughtering or dressing livestock. In the latter case only the employees engaged in the enumerated operations or in operations that are an integral part thereof would be exempt” [Emphasis supplied]. Opinion Letter of Administrator written on July 9, 1941.

2. *Paragraphs 18 and 22 of Interpretative Bulletin No. 14.*

“... The term ‘raw sugar’ describes the product of the first processing of sugar cane, which product normally is thereafter refined before it is consumed. The processing of sugar cane into raw sugar is within the exemption; ...” ¶ 18.

* * * * *

“... truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the ‘place of employment’, for they make regularly recurring trips to and from the establishment and may be deemed attached thereto. Further, some of their work, such as loading and unloading, takes place in the establishment. ...” ¶ 22.

3. *Interpretations as to which employees of a processor are exempt under Section 7(c).*

“When an establishment is *exclusively* engaged in performing operations specifically mentioned in Sec. 7(c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. *Therefore, when an establishment is exclusively engaged in activities enumerated in the section, all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant*” [Emphasis supplied]. 1944-45 W. H. Manual, p. 575.

* * * * *

“Where an establishment is solely engaged in the canning of fresh fruits and vegetables, the labeling, stamping and boxing of the canned goods during the active season by employees of the canner *are exempt operations if performed in the cannery or in a warehouse located on the same premises as the cannery.* On the other hand, activities performed in a warehouse located on premises separate from the cannery, are not conducted in the place of employment where the canning is done, and the exemption is inapplicable to all of the employees working in such a warehouse” [Emphasis supplied]. *Id.*, p. 577.

* * * * *

“... where an establishment is *solely* engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in bunker icing or in cooling cars solely for use in shipping fresh fruits and

vegetables packed in that establishment are exempt” [Emphasis supplied]. *Id.*, p. 577.

* * * * *

“If the plant is used *solely* to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season *solely in the packing plant or in a warehouse located on the same premises*” [Emphasis supplied]. *Id.*, p. 577.

* * * * *

“At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking all employees employed in that establishment are exempt from the overtime provisions of the act for either the entire year or 14 weeks a year, depending on the particular activities involved. This includes office, custodial and maintenance employees.” Statement of Secretary of Labor Schwollenbach submitted to Senate Committee on Labor and Public Welfare, *Hearings on S. 2386 and other bills*, 80th Cong. 2nd Sess., p. 183.

* * * * *

An Opinion of the Wage-Hour Division, dated March 18, 1941, held that the Sec. 7(c) exemption applied to field men employed by canneries to supervise the production and harvesting of raw products purchased under acreage contracts. These men, like employees transporting cane to the mill in the instant case, spend most of their time in the fields but they make the cannery their headquarters and make regularly recurring trips to and from the cannery. The Division held that they should be considered as working in the “place of employment”. 2 C. C. H. Labor Law Service, ¶ 24,700.63. Another Opinion Letter, dated March 18, 1941, held that the Sec. 7(c) exemption applies to pea vining stations if the work performed at the vineries and the cannery, to which vined peas are thereafter removed, is performed as part of a continuous series of operations throughout which the peas remain perishable. 2 C. C. H. Labor Law Service, ¶ 24,700.731.

* * * * *

In the Administrator’s press release answering certain questions about the application of the Sec. 7(c)

exemption to canneries, he pointed out that a truck driver engaged solely in transporting canned citrus from a cannery to market was within the exemption and must be regarded as employed in those portions of the establishment devoted by the employer to the operations described in Sec. 7(c), i.e. the canning of fresh fruits and vegetables. 1944-45 WHMan., pp. 603-604.

* * * * *

An opinion of one of the Administrator's attorneys, appearing in 1944-45 WHMan. p. 612, declared that the Sec. 7(c) exemption for processing cottonseed applied not only to the oil mill in which the cottonseed was crushed but also to a storage house, in which hulls removed from the cottonseed and cottonseed meal were stored.

APPENDIX D.

Statements of International Longshoremen's and Warehousemen's Union to Senate Labor Committee.

"The cane sugar industry [in Hawaii] has three distinct stages. *The first step is the growing and cultivation of cane and the second the milling of cane into raw sugar*, both stages being carried on in the Territory of Hawaii . . . [The third step is the refining of raw sugar and that is carried on in the mainland]." *Hearings on S. 1349*, 79th Cong., 1st Sess., p. 1049.

* * * * *

"The ILWU represents some 28,000 workers engaged in the production and processing of sugar in the Territory of Hawaii. We represent, also, some 8,000 workers in the pineapple industry in the islands. The bulk of these workers are not covered by the Fair Labor Standards Act.

"In the sugar industry, more than 18,000 are field workers, so employed throughout the year. Their work is not seasonal in character. They are, of course, not covered.

"Most of the remaining 10,000 sugar workers are engaged in converting cane into raw sugar in the mills. Though covered by the wages provisions of the act, they are for 10 months of the year excluded by section 7(c) from the hours provisions. During the remaining 2 months, when the mills are shut down for repairs and maintenance, they are covered." *Hearings on S. 2386* (among other bills), 80th Cong. 2d Sess., p. 318.

* * * * *

"The grinding season, during which all mill employees are excluded from the hours provisions of the Fair Labor Standards Act, is limited only by the needs of mill maintenance. Cane is harvested and milled during 10 months of the year. During the remaining two months the mill is shut down and essential repairs are made on the mill, plantation machinery generally, and plantation facilities." *Hearings on S. 1349*, 79th Cong., 1st Sess., p. 1050.

APPENDIX E.

**Administrator's Allowance of Tolerance of Non-Exempt
Work in the Case of Most Exemption Provisions in the
Act.**

In the case of the following exemptions, the Administrator has allowed the indicated percentage of non-exempt work in a workweek without loss of the exemption:

Sec. 13 (a)(1) exemption for executives, professionals, local retailing capacity employees and outside salesmen—20%.¹

Sec. 13(a)(2) exemption for retail establishments—25%.²

Sec. 13(a)(3) exemption for seamen—20%.³

Sec. 13(a)(4) exemption for carriers by air—20%.⁴

Sec. 13(a)(5) fishery exemption—20%.⁵

¹ Regulations, Pt. 541, Title 29, Ch. V. Code of Fed. Reg. (5 F. R. 4077) §§ 541.1 (F), 541.3(A) (4), 541.4(B) and 541.5(B); 3 C. C. H. Labor Law Reporter (4th Ed.) ¶¶ 23,301.01(F), 23,301.03(A) (4), 23,301.04(B), 23,301.05(B). See too *Knight v. Mantel*, 135 F. (2d) 514, 517-518 (C. C. A. 8), *Bender v. Crucible Steel*, 71 F. Supp. 420, 425 (W. D. Pa. 1947), both of which applied the 20% test. See also *Walling v. General Industries*, 330 U. S. 545, 547; *Atkinson Co. v. Lassiter*, 162 F. (2d) 774, 777 (C. C. A. 9), judgment vacated on other grounds, 166 F. (2d) 144; and *Helliwell v. Haberman*, 140 F. (2d) 833, 834 (C. C. A. 2) which seem to approve the 20% test.

² Administrator's Interpretative Bulletin No. 6, ¶ 18; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,480. See also Title 29, Ch. V, Code of Fed. Reg., Pt. 779 (13 F. R. 1376) § 779.2; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,105.02. The 25% test has been applied as appropriate in a number of cases. *Harris v. Hammond*, 145 F. (2d) 333, 334 (C. C. A. 5) *cert. den.* 324 U. S. 859; *Northwestern Hanna Fuel Co. v. McComb*, 166 F. (2d) 932, 937-938 (C. C. A. 8); *Brown v. Mingas Co.*, 51 F. Supp. 363, 371 (D. Minn. 1943).

³ Title 29, Ch. V, Code of Fed. Reg., Pt. 783 (13 F. R. 1376), § 783.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,109.50.

⁴ Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart A (13 F. R. 1376) § 786.1; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.01.

⁵ Title 29, Ch. V, Code of Fed. Reg., Pt. 784 (13 F. R. 1376) § 784.1; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,110.01.

Sec. 13(a)(8) exemption for local newspapers — 49.999%⁶

Sec. 13(a)(9) exemption for street, suburban, etc. railways and local trolley and motor bus operators—20%.⁷

Sec. 13(a)(11) exemption for switchboard operators—20%.⁸

Sec. 13(b)(2) exemption for employees of employers subject to Pt. I of the Interstate Commerce Act—20%.⁹

⁶ 3 C. C. H. Labor Law Reporter (4th Ed.) ¶¶ 25,260.05 and 25,260.34. The 49.999% test was also applied in *Robinson v. North Arkansas Printing Co.*, 71 F. Supp. 921, 923 (W. D. Ark. 1947).

⁷ Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart B (13 F. R. 1376) § 786.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.50.

⁸ Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart C (13 F. R. 1376) § 786.100; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.100.

⁹ Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart D. (13 F. R. 1376) § 786.150; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.150.

No. 11,952

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A Corporation,

Appellant,

versus

CIRACO MANEJA, ET AL.,

Appellees.

and

CIRACO MANEJA, ET AL.,

Appellants,

versus

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A Corporation,

Appellee.

*On Appeal from the District Court of the United States
for the District of Hawaii.*

**BRIEF FOR AMERICAN SUGAR CANE LEAGUE OF
UNITED STATES OF AMERICA, INC.**

As Amicus Curiae.

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*On Appeal from the District Court of the United States
for the District of Hawaii.*

**BRIEF FOR AMERICAN SUGAR CANE LEAGUE OF
THE U.S.A., INC. AS AMICUS CURIAE.**

STATEMENT

On motion duly made, the American Sugar Cane League of the U. S. A., Inc. (hereinafter referred to as the American Sugar Cane League) was granted leave by this court on October 26, 1948 to file a brief as *amicus curiae* herein.

The American Sugar Cane League is a nonprofit association organized under the laws of the State of Louisiana. Its members, all of whom are located in the State of Louisiana, are (1) growers of sugar cane or farmers, and (2) processors of sugar cane into sugar and molasses. There are presently in Louisiana 57 plants engaged in processing sugar cane into sugar and molasses, and approximately 10,000 growers who plant, cultivate and harvest sugar cane which is processed in such plants into sugar and molasses.

The American Sugar Cane League appears herein as *amicus curiae* because its members will be vitally affected by the results of this litigation. This is so because in many respects the operations of sugar cane growers and processors in Louisiana are substantially identical with those of the appellant, Waialua Agricultural Company, Limited. The members of the American Sugar Cane League therefore have a real interest in the determination of the correct interpretation of the Fair Labor Standards Act (herein called the Act), and especially section 3(f), 7(c), and 13(a) (6).

A portion of the sugar cane processed into sugar and molasses in Louisiana is grown or produced by the processors on farms or plantations owned and operated by them. These plantation or farm operators are growers or farmers as well as processors. The remaining sugar cane is produced by independent growers and is delivered and sold to the processors, the price being established by determinations of fair and reasonable prices issued by the Secretary of Agriculture of the United States under the provisions of the Sugar Act of 1948 (formerly Sugar Act of 1937).

Activities of Sugar Cane Growers in Louisiana

In Louisiana, freezing temperatures occur from December to March killing the growth above ground during that period. The cane sprouts again in March or April. The crop harvested each year is composed in part of "stubble" cane which is the new growth from the cane harvested the preceding year, and in part of "plant" cane which is the first crop from planted seed cane.

On the various sugar cane farms and plantations in Louisiana, the growers are engaged during the entire year in one or more of the following operations: preparing land for the planting of sugar cane; growing leguminous crops preparatory to planting sugar cane; cultivating sugar cane; applying fertilizer; digging and maintaining ditches used to drain the cane fields; and harvesting sugar cane. The growers maintain and keep in repair dirt and gravel roads on their farms and plantations, over which they transport by truck agricultural laborers, supplies and equipment throughout the year to and from the cane fields. During the harvesting period the growers transport sugar cane to the processing mills over these roads. Such transportation of sugar cane to the mills, except as will appear below, takes place by truck. Maintenance and repair work on the said roads on the farm or plantation is rather constant.

Each large plantation operates a shop which is used for prompt repairs and emergency work on agricultural equipment and machinery used on the plantation in the growing of sugar cane.

Activities of Sugar Cane Processors in Louisiana

As already explained the processors also grow sugar cane. The cane which they process is both that which

they grow and that grown by other farmers. Some of these processors individually, own, operate and keep in a state of good repair a narrow gauge railroad over which they transport to their mill the sugar cane which they process. The repair work on the railroad facility takes place either at the site of the railroad or in the repair shop referred to below.

Each mill grinds and processes sugar cane into sugar and molasses. The sugar is immediately bagged and in most cases it is immediately loaded for shipment and shipped to market by trucks or by rail. In some cases however, due to limited shipping facilities, bagged sugar is stored temporarily in space especially provided for that purpose at the mill, and is thereafter shipped to market. The molasses upon its production is loaded in tank cars for immediate shipment or pumped into large storage tanks located in or near the mill for future shipment.

Sugar cane is extremely perishable and starts to deteriorate almost immediately after harvesting and, therefore, must be processed promptly at the mills. Further, after being subjected to freezing temperature, sugar cane commences to deteriorate rapidly. In Louisiana because the sugar cane does not mature prior to October, and because freezing temperatures usually occur in December, the harvesting and processing season is by nature normally restricted to a period of from seventy to ninety days. These climatic conditions and conditions inherent in the sugar cane make it imperative that the processing operations be conducted continuously twenty-four hours each day seven days each week during the harvesting season.

In the course of processing, the sugar cane is

crushed and when all recoverable juice is extracted there remains a comparatively dry fiber which is called "bagasse". The bagasse is used in most instances for boiler fuel to produce steam to drive engines and other equipment of the processing plant; to heat and evaporate the juices and to crystallize sugar; and to generate electric power needed in the processing plant in the course of processing.

The sugar cane processor maintains and keeps in good repair the equipment and other facilities used in the cane processing operations, in bagging sugar and in storing, loading and shipping sugar and molasses. This work is usually done in the mill building proper, but in some cases it is done in a nearby shop which is part of the processing plant. Such shop may or may not be the same shop as the one at which the processor repairs the agricultural equipment and machinery used in his growing operations and which is referred to above.

ARGUMENT

- I. Employees Of Sugar Cane Growers Are "Employed In Agriculture" Within The Meaning Of Section 3(f) Of The Fair Labor Standards Act And Therefore Are Exempt From The Wage And Overtime Provisions Of The Act As Provided By Section 13(a)(6) When They Are Engaged In Any Activity Involved In The Growing And Harvesting Of Sugar Cane And Delivery Of Cane To The Processing Mill.***

It is difficult to determine from the court's decision (R. 410-437) precisely which activities of a sugar cane plantation it held to be non-exempt. However, when such decision is read in the light of the court's judgment (R. 440-445) and the facts that are detailed in

the Stipulation of the Parties (R. 129-256), it would appear that the court below held that the agricultural exemption does not apply to employees of sugar cane growers engaged in the follow activities: digging and maintaining ditches used to drain the cane fields; transportation by truck, over field roads on the farm, of agricultural laborers, supplies and equipment; transportation by narrow gauge railroad or truck of sugar cane from the cane fields on the farm to the processing mill; maintaining and repairing field roads on the farm; repairing on the farm the agricultural machinery and equipment used thereon in connection with the growing of sugar cane.

We submit that these holdings of the lower court are in error and that all such activities performed by the farmer are within the agricultural exemption provided by the Act. This is shown by the language of the exemption provision, its legislative history, the judicial decisions dealing with the exemption provision and the administrative interpretations thereof.

The statutory definition of "agriculture" includes "farming in all its branches", "harvesting of any agricultural or horticultural commodities", and "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". Such phrases clearly include the activities held non-exempt by the District Court in this case, as all of such activities are essential to the growing and marketing of the farmer's crop.

Thus a sugar cane grower cannot grow his crops unless he digs and maintains ditches for draining his

cane fields, or unless he transports over the field roads on his farm to the cane fields the agricultural laborers, supplies and equipment needed to grow his crop and keeps such field roads in a usable condition, or unless he keeps in good condition the machinery and equipment necessary to grow his crop. Likewise the sugar cane farmer cannot market his cane unless he transports same to the processing mill and in that connection maintains and repairs his transporting facilities. To deny exemption to these activities is to render meaningless the agricultural exemption in the Act. Such activities are as much part of "farming" as are the planting of seed and the cultivation of land. Moreover, all such activities fall within the portion of the definition of "agriculture" exempting practices incident to and in conjunction with farming operations, for no activities could be more plainly incident to or in conjunction with farming operations than such activities. Again the farmer's activity of transporting sugar cane to the mill and maintaining in good repair the facilities used for such transporting is part of "harvesting". "Harvesting" has never meant simply the severance of the crop from the ground or the tree. It has always included "gathering in the crop". The transportation activity in question is simply such "gathering in" of the sugar cane crop.

Not only the statutory language of section 3(f) but the purpose of the agricultural exemption as well, as revealed by its legislative history, supports our position that the activities in question are exempt. Congress intended the exemption to be far-reaching (See *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 612) and to include all agriculture, so that no part of agriculture would be subjected to the costs that the Act imposes

upon industrial operations. 83 Cong. Rec. 9162-9163. It was felt that since the farmer's operations are governed largely by weather and other natural factors, the overtime obligations of the Act ought not be imposed upon him. The activities presently being discussed are as much governed by such natural factors as any other factors of the farmer's operation.

The case law and the administrative interpretations of the agricultural exemption by the Administrator of the Wage and Hour Division (hereinafter referred to as the Administrator) also fully support our position that the activities in question come within said exemption. All judicial decisions other than the one below have allowed the exemption to these activities and the Administrator's interpretations have consistently exempted such activities.

The court below denied exemption to these activities chiefly on the ground that in the case of appellant's operations such activities are highly mechanized. But as the courts have recognized, this is a wholly immaterial factor. *Damutz v. Pinchbeck*, 158 F. (2d) 882, 883 (C.C.A. 8). See also *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 612, 614 and *Miller Hatcheries v. Boyer*, 131 F. (2d) 283, 285 (C.C.A. 8). In Louisiana, as in Hawaii, such activities are mechanized. But so too are the plowing, cultivating and other field operations of the growers. To make the exemption dependent upon whether or not operations are mechanized is to inject a qualification which Congress did not see fit to write into the agricultural exemption. Nor has Congress seen fit since the passage of the Act to amend the exemption so as to write in such qualification despite repeated efforts by certain groups to have it do so.

Such efforts are fully explained in the brief filed with this court by appellant, Waialua Agricultural Company, Limited, at pp. 39-40.

We shall not elaborate further our argument that the activities hereinabove listed and discussed in Part I of our argument (*supra* p. 6) are exempt under the agricultural exemption in the Act. The brief for appellant, Waialua Agricultural Company, Limited, (pp. 15-50) has developed such arguments at length. We submit that all such arguments are sound and we join fully therein.

II. *Employees of Processors of Sugar Cane, Who Transport Sugar Cane from the Farm Where Grown to the Processing Mill, Process the Cane into Sugar (But Not Refined Sugar) and Molasses, Temporarily Store, Load and Ship Same to Market, and Engage in Closely Related Operations, are Exempt from the Over-Time Provisions of the Act By Virtue of Section 7(c).*

As previously explained, in Louisiana some sugar cane is transported to the processing mill by narrow gauge railroad owned and operated by the mill. This normally occurs as follows: A large sugar cane plantation has a mill at which there is processed the cane grown on that plantation and also the cane grown by other growers who do not have any processing facilities. The plantation has a narrow gauge railroad over which it transports to the mill the cane that it grows and also cane grown by the independent growers. In order for such railroad to be usable, employees of the plantation must keep it in good repair.

After the cane reaches the mill it is processed into sugar and molasses and the sugar is bagged. The sugar

and molasses are then loaded and shipped to market or first temporarily stored and then loaded and shipped to market.

The court below denied the applicability of the section 7(c) exemption to (a) transportation of sugar cane to the mill by narrow gauge railroad; (b) repair and maintenance of equipment and facilities used in the processing of sugar cane into sugar and molasses, bagging sugar, and loading, storing and shipping sugar and molasses where such repair and maintenance are not performed in the mill building proper; (c) repair and maintenance of equipment and facilities used in connection with supplying power to the mill for cane processing; and (d) loading and shipment of sugar and molasses out of storage places, bins or tanks where the sugar and molasses have previously been temporarily stored. We contend that these holdings of the court below are erroneous and should be reversed. The language and legislative history of section 7(c) and the judicial decisions and administrative interpretations thereunder demonstrate beyond doubt that all the operations held non-exempt by the District Court under section 7(c) are in fact exempt.

Section 7(c) grants exemption from the overtime provisions of the Act to employees in any "place of employment" where their employer is engaged "in the processing of * * * sugar cane * * * into sugar (but not refined sugar) or into syrup". Thus, in order to secure exemption under section 7(c) a processor of sugar cane into sugar and molasses must show the following: (a) he is engaged in processing sugar cane into sugar (but not refined sugar) or molasses; (b) the employees for whom exemption is claimed work in the "place of

employment" where the employer is engaged in such processing. Both of these conditions obtain with respect to the employees of a sugar cane processor engaged in the activities held nonexempt by the District Court.

The transportation of sugar cane by the processor thereof by narrow gauge railroad to the mill, the repair and maintenance of the equipment and facilities used in such transportation, and the repair and maintenance of all the equipment and facilities used at the mill for the processing operation, including the power equipment and facilities, are an integral part of the processing of sugar cane into sugar and molasses. Without such activities there could be no sugar cane processing. In so far as repair work is concerned, this is true whether done at the mill building proper or done in a nearby shop.

Furthermore all of the activities in question are performed on the same premises. Employees who transport the sugar cane to the mill on the narrow gauge railroad make regularly recurring trips to and from the mill and must be considered attached thereto. In Louisiana the repair shop is usually in the same building as the mill, but even if, as in some cases, it is in a separate building, such building is very close to the mill and is functionally part of the processing plant. The term "place of employment" as used in section 7(c) of course means all the premises on which are located the buildings and facilities used in the "processing of * * * sugar cane * * * into sugar". Such term is obviously a broader term than the word "establishment" which Congress used in other sections of the Act (See sections 12 and 13(a)(10) and must therefore be accorded a broader meaning.

The legislative history of section 7(c) also shows that the activities in question are exempt thereunder. Such history is clear to the effect that the exemption for processing sugar cane into sugar and molasses was to be a full and absolute exemption. 83 Cong. Rec. 9254, 9266. This Congressional purpose would be ignored if exemption were to be denied the activities presently being discussed.

The case law under section 7(c) also supports our contention. In addition to the cases discussed on pp. 56-60 of the appellant's brief herein, the court's attention is directed to the following cases: *Walling v. Bridgeman-Russell Co.* (D. Minn. 1942) 6 Labor Cases § 61,422 (exemption in section 7(c) for the first processing of milk, skimmed milk, whey and cream into dairy products held applicable to employees making butter and cutting, printing and packing same); *Sugar Creek Creamery v. Walker & Baker*, 208 Ark. 639, 187 S.W. (2d) 178 (1945) (employees of company manufacturing milk into cheddar cheese and cream into butter held exempt under the section 7(c) dairy products exemption. One of the employees secured milk for the plant, and also worked in the plant unloading containers, testing and weighing cream, washing cans, taking the cheese curd out of the vat, etc.); *Armour v. Carpenter*, 193 Okla. 153, 141 Pac. (2d) 797 (1943); (employee working in combined creamery and poultry plant testing cream, purchasing poultry and issuing company checks in payment for cream and poultry held exempt the year around under the section 7(c) dairy products exemption with respect to his work on cream and exempt for 14 workweeks per year under the section 7(c) exemption for handling, etc. of poultry with respect to his activities on poultry.

The interpretations under section 7(c) issued by the Administrator also support our contention that the activities in question are exempt under that section.

The language and legislative history of section 7(c), and the case law and administrative interpretations thereunder, all show that the activities in question are exempt under section 7(c). We agree with and join in the arguments and authorities set forth on pp. 53-64 of appellant's brief.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In the
United States Court of Appeals
For the Ninth Circuit

No. 11952

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A CORPORATION, *Appellant,*
vs.

CIRACO MANEJA, ET AL.,
and *Appellees,*

CIRACO MANEJA, ET AL.,
vs. *Appellants,*

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A CORPORATION, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF HAWAII.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

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and

CIRACO MANEJA, ET AL.,

Appellants,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A CORPORATION,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF HAWAII.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

STATEMENT.

On motion duly made, the American Farm Bureau Federation (hereinafter referred to as the Farm Bureau) was

granted leave by this court on November 4, 1948, to file a brief as *amicus curiae* herein.

The Farm Bureau is a nonprofit corporation organized under the laws of the State of Illinois. It is a general farm organization of more than 1,250,000 farm families in 45 states of the United States and Puerto Rico.* The objects of the Farm Bureau are to promote, protect and represent the business, economic, social and educational interests of the farmers of the United States, and generally to develop agriculture. It sought and secured permission to file a brief herein in order to show to this court that the decision below, if sustained, would deprive not only sugar plantations in Hawaii but all farmers in the United States of the agricultural exemption in the Fair Labor Standards Act with respect to many activities which clearly fall within the language and purpose of that exemption.

We shall not review the facts in this case since they have all been stipulated by the parties and are set forth in the brief filed with this court by the appellant, Waialua Agricultural Company, Limited.

As we read the decision (R. 410-437) and judgment (R. 440-445) below, it destroys for American agriculture the very broad and carefully drawn exemption for "agriculture" appearing in sections 13(a)(6) and 3(f) of the Fair Labor Standards Act (hereinafter called the Act). The decision seems to attempt some distinction between mechanized and non-mechanized farming operations and between large and small farming operations. The decision denies the agricultural exemption to the many activities involved in the case which are common everyday activities performed by most American farmers and farms. Such activities are: (1) the hauling by the farmer of the farm's products to a storage place or a processing plant located either on or off the farm or to any market; (2) the hauling of fertilizer,

* The Farm Bureau has never had any membership in Hawaii.

seed, other agricultural supplies, and agricultural equipment from one part of the farm to another; (3) the hauling by the farmer of necessary farm supplies and equipment from a nearby town to the farm; (4) the maintenance, repair and operation by the farmer of his trucks and other hauling facilities, including maintenance of field roads on the farm; (5) the repair and overhauling by the farmer or on the farm of farm machinery, equipment and implements; (6) the feeding and shoeing by the farmer or on the farm of horses and mules used on the farm; (7) the maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farm operation; and (8) the processing by farmers or on the farm of agricultural products grown on the farm preparatory to marketing.

We contend that the above enumerated activities fall squarely within the agricultural exemption provided by the Act. If the decision and judgment below holding otherwise are sustained, then all American agriculture, and not only sugar cane farming, will be substantially deprived of the exemption which the Act grants. We therefore pray that this court reverse the decision and judgment of the court below insofar as it denies exemption to the above enumerated activities.

We shall now show that the language of the exemption provision, its legislative history, the case law and the administrative interpretations of the Administrator of the Wage and Hour Division thereunder unassailably establish that such activities are exempt under section 13(a)(6) of the Act.

ARGUMENT.

EMPLOYEES ENGAGED IN THE AFOREMENTIONED ACTIVITIES ARE EMPLOYED IN "AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND ARE THEREFORE EXEMPT FROM THE WAGE AND HOUR PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13(a) (6).

A. The exemption is not destroyed because farm operations may be mechanized.

As the courts have recognized, the Act in section 3(f) contains a very broad, comprehensive and far reaching definition of the term "agriculture". *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 612; *Damutz v. Pinchbeck*, 158 F. (2d) 882, 883 (C. C. A. 2); *McComb v. Farmers Reservoir Co.*, 167 F. (2d) 911, 914 (C. C. A. 10). The definition does not distinguish between farming operations that are mechanized and those that are not mechanized, and the courts in the cases above cited have refused to recognize any such distinction. See also *Miller Hatcheries v. Boyer*, 131 F. (2d) 283, 285 (C. C. A. 8). If an employee comes within the statutory definition, he is exempt without qualification, whether his operation is conducted by hand or by extremely complex machinery. For the past 35 years or more there have been great technological advances in American agriculture and the United States Department of Agriculture has encouraged such technological advances. These have taken place in the case of many varieties of farming. *Hopkins, Changing Technology and Employment in Agriculture* (U. S. Department of Agriculture, 1941) p. 53. For example, the labor required on an acre of wheat in 1934-36 was half the amount needed in 1909-13. *Technology on the Farm* (U. S. Department of Agriculture, 1940) p. 61. As part of this trend toward greater pro-

ductivity, each census since 1880, with few exceptions, has shown an increase in the average size of farms. The most noticeable increases were in the areas best suited to the use of power equipment. *U. S. Census of Agriculture* (1945) Pt. II, p. 65. Approximately as of the date of enactment of the Fair Labor Standards Act, about 10% of the nation's farms accounted for 54% of the farm produce and 68% of the cash farm wage bill in the United States. Supp. Rep. 1012, Pt. II, Committee on Education and Labor, 79th Cong. 1st Sess., p. 77. The record in the present case demonstrates how these technological advances have taken place in the case of appellant's sugar plantation (R. 215-217).

When Congress enacted the Fair Labor Standards Act in 1938, it was presumably aware of these technological forward strides in agriculture. Had it intended to distinguish in the exemption for agriculture written into the Act between those farms which are not mechanized and those which are, it could quite easily have expressed such intent. It did not do so, but as we shall show, simply defined the term "agriculture" in functional terms. The court below, therefore, was completely in error in denying exemption to the agricultural activities of appellant on the ground that such activities are mechanized. Degree of mechanization is a factor of no relevance.

B. Section 3(f) was intended to exempt anything the farmer does in connection with growing and marketing his crop and in addition anything that is done on the farm in connection with growing and marketing the crops of that farm.

The definition starts with "farming in all its branches". It then proceeds to enumerate specific activities including preparation of the soil, growing of agricultural commodi-

ties, and harvesting of them. Finally the definition includes

“any practices (including any forestry or lumbering operations) performed by a farmer *or* on a farm as an incident to *or* in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” (Emphasis supplied.)

Language could not be more clear to evince an intent to exempt all activities performed by the farmer or on the farm in connection with growing and marketing the farm's crops.

We consider briefly the terms “farm” and “farmer”. Generally speaking the term “farm” means a tract of land or several tracts of land or fields owned or controlled by one or more persons and devoted to the production of agricultural products as a single enterprise under common management with common equipment and labor. Many farms consist of several and sometimes many separate tracts or fields. The operator of the farm has always been designated a “farmer.” Most farmers are individuals. However, there are thousands of farming partnerships in the United States and in recent years it has been quite common for joint owners to incorporate rather than to operate as partners. All of such types of farmers are included within the membership of Farm Bureau.

Practically every farm in the United States, whether large or small, and whether it produces livestock, milk or grows grain, forage, crops, seed, cotton, fruits or vegetables, tobacco or any other agricultural commodity, engages in the activities which the court below held non-exempt. Almost all farmers, as part of their harvesting operations, haul their crops to a storage place or a processing plant located either on or off the farm or to some market. A great many of them conduct extensive process-

ing operations upon their own crops. For example, many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. The apple farmer, for example, may haul his apples to a storage place on the farm or he may sort, wrap and pack the apples and otherwise prepare them for market or he may can the apples in one form or another, or he may haul them to a packing plant off the farm to which he sells them. The grain farmer may haul his grain to a storage place on his farm or to a nearby elevator to which he sells same; the dairy farmer may haul his milk to a bottling plant on his own farm or to a nearby bottling plant to which he sells same, or he may process the fluid milk into butter and cheese on his own farm and then transport the same to market; the cotton farmer may haul his cotton to a gin located on or off the farm, and so forth. Unquestionably, when so performed, these are operations performed by a farmer or on a farm as an incident to or in conjunction with farming operations; *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995 (S. D. Calif. 1940); *Damutz v. Pinchbeck*, 159 F. (2d) 882. All farmers likewise haul agricultural supplies and equipment to the particular field or fields of the farm where such supplies and equipment are to be used; all of them go to town with their trucks or other vehicles to pick up supplies and equipment for use on the farm; all do some maintenance work to keep in good usable condition their trucks or other hauling facilities, including the field roads on the farm; all do some repair work on their agricultural equipment, machinery and implements; many feed and shoe their horses and mules; and all do some maintenance and repair work on the farm buildings and grounds, and with tools and implements used in the farming operation. Without some or all of these various activities, no farm could grow

or produce anything. Thus the decision below, if sustained, would apply to all farming and would effectively destroy the agricultural exemption for all farms and not only for the Hawaiian sugar plantations.

Furthermore, with respect to the various hauling activities, no distinction can be drawn on the basis of the medium used for such hauling. In some cases as in the case before the court here, the medium used for bringing in the sugar crops to the mill is a narrow gauge railroad, although it appears from a recent Government report that many other methods of transportation are used on Hawaiian sugar plantations with a general trend toward large motor trucks. *The Economy of Hawaii in 1947*, Bureau of Labor Statistics, U. S. Department of Labor, Bulletin No. 926, p. 45. In the case of a small cotton or tobacco farmer, he may haul his cotton to the cotton gin or his tobacco to a tobacco stemmery by horse-drawn vehicle. In the case of a dairy farmer or a fruit farmer, he may haul his milk or fruit to a bottling plant or to a packing establishment by large truck. In many instances such trucks will be 10-ton or larger in size. We note that in the case at bar the rail cars on the narrow gauge railroad averaged only 4 and $\frac{3}{4}$ tons per car gross cane (R. 157). We cannot conceive of any basis upon which the type of vehicle used in the hauling could make any difference in the application of the exemption. As an economic matter the farmer, consistent with his means, will use that mode of transportation best suited for his type of farming. In all cases, however, whatever the medium used, the hauling is simply an inseparable part of the farmer's operations of growing agricultural commodities, harvesting them and marketing them.

It is perfectly plain then that the statutory definition of agriculture when it refers to "farming in all its branches", "harvesting" and "practices . . . performed by a farmer

or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market", includes the activities listed *supra*, pp. 2, 3.

C. The legislative history of sections 13(a)(6) and 3(f) confirms that all the activities here described were intended to be exempt.

As the bill which finally became the Fair Labor Standards Act worked its way through the legislative mill to final passage, repeated assurances were given that a full exemption had been accorded to all activities performed by the farmer or on the farm in connection with the growing and marketing of the farm's crops. All agreed that the agricultural exemption was to be plenary and that all agriculture without exception was excluded from the coverage of the Act. It is obvious from the legislative history that the bill never would have become law but for such assurances and the consequent feeling on the part of the legislators that *all* agriculture was in fact exempt. 83 Cong. Rec. 7393, 9257.*

The bill (S. 2475) was introduced in the Senate on May 24, 1937 and was referred to the Senate Committee on Education and Labor, which wrote into the bill a broad definition of "agriculture" and then reported it to the Senate. *S. 2475, as reported in the Senate, July 6, 1937*, Sec. 2, pp. 50-51. Senator Black, Chairman of the Senate Committee in charge of the bill, stated to the Senate that the bill specifically excluded workers in agriculture of all kinds and of all types. 81 Cong. Rec. 7648. When he made this statement the agricultural definition in the bill, insofar as it related to practices incidental to farming

* We are not setting forth any part of the text of the debates as representative portions are contained in Appendix A of the Brief for Appellant (Pages 81 to 87, inclusive).

operations, limited the exemption to those practices “ordinarily” performed by a farmer as an incident to farming operations.

In various colloquies between Senator Black and other Senators, the former made it clear that the exemption applied to all the things the farmer did with reference to producing his crops and marketing them—whether the crops were cotton, fruits or vegetables, or any other commodity. 81 Cong. Rec. 7657, 7658, 7659. Senator McGill then proposed an amendment which was adopted with the approval of the Labor Committee, which amendment provided that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices ordinarily performed *on a farm* as an incident to such farming operations. His amendment further added to the exemption for agriculture the activity of “delivery to market”. The purpose of the McGill amendment, as explained by its author, was to exempt *all* kinds of labor performed on a farm so long as it was “incidental to agricultural purposes” and was merely preparatory to the marketing of *any* field crop and *all* kinds of labor performed in connection with making delivery to market of agricultural products. The discussions on Senator McGill’s amendment are abundantly clear that such amendment was intended to apply to any commodity produced on a farm—peanuts, fruits and vegetables, grain, sugar cane, etc. 81 Cong. Rec. 7888, 7927, 7928-7929.

The language added to the agricultural definition by Senator McGill’s amendment remained in the bill and was ultimately part of the bill as enacted. No activities are more essentially “incidental to agricultural purposes” than those we are presently discussing. To deny exemption to them as the court below effectively did is to flaunt the clearly expressed legislative purpose.

When the bill as passed by the Senate went to the House of Representatives, the House Labor Committee rewrote the agricultural exemption and purposely struck the word "ordinarily" from that part of the definition relating to incidental practices. H. Rep. No. 1452, 75th Cong., 1st Sess. pp. 4-5, 11. And the word "ordinarily" never again reappeared in the definition. The bill as it was first reported by the House Labor Committee was recommitted to such Committee and on April 21, 1938, another draft of S. 2475 was reported to the House. As so reported, once again the definition of "agriculture" was broadened by adding to the incidental practices portion of the definition the activities of "preparation for market", "delivery to storage", and "delivery * * * to carriers for transportation to market". H. Rep. No. 2182, 75th Cong. 3rd Sess. p. 2. It was in this form that the bill was passed in the House.

If there had been any doubt theretofore that the hauling by a farmer of his crops to a storage place or to carriers to transport same to market was exempt, such doubt was completely eliminated by the addition of the foregoing phrases to the definition.

The two Houses of Congress then held a conference on the bill. In such conference they retained every amendment that had previously broadened the definition of "agriculture". But they went further. They broadened the exemption still more by exempting *all practices performed by a farmer or on a farm "in conjunction with such farming operations"*. 83 Cong. Rec. 9253-9254. This further broadening is additional confirmation that Congress intended to include in the exemption all of the activities we are discussing, since all of them are obviously performed by the farmer or on the farm *in conjunction with* the farming operations of growing crops. All of them are vital to the growing operation which could not otherwise take place.

When the conference report was debated in the Senate, Senator Thomas of Utah, who had succeeded Senator Black as Chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that agriculture was exempted from the operation of the bill, that he did not know of any kind of agriculture that was included in the bill, and that the definition of agriculture was purposely made all-inclusive. 83 Cong. Rec. 9162-9163.

The legislative history will be searched in vain for any hint that Congress intended by the agricultural exemption to exempt only small farms doing their work with hand labor. On the contrary, there was discussion concerning many highly mechanized operations and it was made plain by the proponents of the legislation that such operations would be exempt if they came within the definition. 81 Cong. Rec. 7656, 7657, 7658, 7659. Farm operations, unlike industrial operations, cannot be regulated by the clock. The coming and going of the seasons do not await the pleasure of man. Sunshine, rain, humidity and warmth are not yet subject to man's control. The time to plant and the time to harvest are determined by the whims of nature. Plant and animal growth continues around the clock. Successful farming demands long hours of labor on certain days and little or no hours of labor on others. Frost, heat, humidity, rainfall, relative day and night temperature, presence or absence of pests are the practical factors governing these demands. No limitation or regulation of the farmer's hours is possible in an efficient farming operation. This is the underlying reason for the agricultural exemption. See the testimony of various witnesses at the Joint Hearings on S. 2475 and H.R. 7200 (the related House bill) held in June, 1937, Pt. 3, 81 Congressional Record, pp. 1007, 1083, 1120-1121, 1133-1134. Senator McAdoo speaking on the floor of the Senate in support of an amendment

to the definition of agriculture which would have exempted "any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits", stated the proposition thusly:

"These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill but will also protect the farmers, who, in my State at least, are engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States." (81 Cong. Rec. 7927.)

Whether or not the farmer's operations are mechanized, the farmer must do his work when he can, depending upon natural factors. Consequently, the imposition of overtime requirements upon the farmer would not fulfill the purpose of the Act to induce employers to reduce hours of work and employ more men. See *Walling v. Youngerman Reynolds Hardwood Co.*, 325 U. S. 419, 423-424, and cases there cited. It would simply impose additional costs and other obligations upon the farmer without the beneficial results which Congress found would flow from the imposition of overtime requirements upon industry. Hence, Congress granted a complete exemption to all agriculture regardless of the mechanized character of the operation. The court below in its decision has ignored this Congressional purpose.

D. No court other than the court below has denied exemption to the activities in question.

The judicial decisions under the Fair Labor Standards Act fully support our position that the activities listed *supra*, pp. 2, 3, come within the agricultural exemption provided by the Act, and that it is irrelevant whether or not the farming operations are large or small, manual or mechanized. In addition to the cases cited on pages 4 and 7, *supra*, and those cited in the appellant's brief at pages 40-47, the court's attention is drawn to the following cases where the exemption was held applicable: *Jordan v. Stark Brothers Nurseries* (W.D. Ark. 1942), 6 Labor Cases ¶61,468 (employees of a nursery engaged in transporting trees from the fields where they were grown to a packing shed of the employer where they were sorted, graded, and tied into bunches for shipment); *Walling v. Craig*, 53 F. Supp. 479, 483 (D. Minn. 1943) (repair and reconditioning of bulldozers, tractors, and trucks devoted to agricultural activities); *Walling v. Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wisc. 1943) (handling and milling of onion sets by the employees of an employer who grows the onion sets); *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995, 1006 (S. D. Calif, 1940) (packing by farmer of fruit he grows himself or bottling by a farmer of honey gathered on his farm); *Dye v. McIntyre Floral Co.*, 176 Tenn. 527, 144 S. W. (2d) 752 (1940) (employees of a nursery, who receive, care for, and prepare for shipment nursery products grown by the nursery or purchased from others); *Belt v. Hodges*, (N. D. Tex., 1941) 4 Labor Cases ¶60,664 (employee working for a farm implement dealer trading farm implements for livestock).

E. The Administrator of the Wage and Hour Division has consistently held all of the activities in question to be exempt under section 13(a)(6).

1. Hauling of farm's products to a storage place or a processing plant located either on or off the farm or to any market.

(i) In *Interpretative Bulletin* No. 14, issued in August, 1939, 3 *C.C.H. Labor Law Reporter* (4th ed.) ¶24,488, the Administrator construing the agricultural exemption stated:

“If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term” i.e. “practices * * * performed by a farmer * * * as an incident to or in conjunction with such farming operations”. ¶10(f).

(ii) In an opinion letter written by him, the Administrator expressed the view that employees of an alfalfa grower, who haul the alfalfa grown by that grower to a processing plant located off the farm, are exempt under section 13(a)(6). WHMan. (1944-45) p. 594.

(iii) In paragraph 5(a) of *Bulletin* 14, the Administrator stated that the term “harvesting of any agricultural or horticultural commodities”, as used in section 3(f), includes all “operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc.”

(iv) In paragraph 10(c) of the *Bulletin*, the Administrator stated as follows with respect to the term “delivery to storage” appearing in the definition of “agriculture”:

“The term ‘delivery to storage’ includes taking the commodities, dairy products, . . . to the places where they are to be stored or held pending preparation for or delivery to market”.

(v) In paragraph 10(d) of the *Bulletin*, the Administrator stated as follows with respect to the term “delivery . . . to market” appearing in the definition of “agriculture”:

“The term ‘delivery . . . to market’ includes taking the commodities, dairy products . . . to market”.

(vi) In paragraph 10(e) of the *Bulletin*, the Administrator stated as follows with respect to the term “delivery * * * to carriers for transportation to market” appearing in the definition of “agriculture”:

“The term ‘delivery . . . to carriers for transportation to market’ includes taking the commodities, dairy products . . . to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market”.

(vii) In paragraph 10(f) of the *Bulletin*, the Administrator stated that besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption. As one such practice he mentioned the actual selling of the agricultural or horticultural commodities, etc.

All of the foregoing opinions relate to hauling and marketing activities performed by the farmer. The Administrator, however, has also recognized that if hauling activities are confined to a particular farm and consist of hauling on that farm the crops grown thereon to a storage place or processing plant located on that farm, the agricultural exemption also applies to such hauling activities. Thus in paragraph 11 of his *Bulletin* No. 14, he dealt with the term “practices . . . performed . . . on a farm as an incident to or in conjunction with such farming operations” appearing in the definition of “agriculture”. He stated that with the exception of “delivery to market”, which necessarily involves working off the farm, the practices described in paragraph 10 of his *Bulletin*, even if performed by employees of someone other than the farmer,

would be exempt so long as they were performed on the farm. And as we have already seen, among the practices he described in paragraph 10 of his *Bulletin* were those of hauling crops to a storage place, processing plant or a carrier for transportation to market.

2. Hauling by the farmer of necessary farm supplies and equipment from a nearby town to the farm.

In paragraph 10(f) of his *Bulletin* No. 14, the Administrator stated:

“The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt.”

This example shows plainly that in the Administrator's view the hauling by the farmer's employees of agricultural supplies and equipment to the farm for use in the farming operations is exempt.

3. Operations functionally necessary to farming performed by the farmer or on the farm.

Included among such operations are the hauling of fertilizer, seed, other agricultural supplies and agricultural equipment from one part of the farm to another; repair and maintenance by the farmer or on the farm of the farmer's hauling facilities, including field roads on the farm; repair by the farmer or on the farm of farm machinery, equipment and implements; feeding and shoeing by the farmer or on the farm of horses and mules used in the farm operations; and maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farming operation.

In paragraph 12 of *Interpretative Bulletin* No. 14, the Administrator said as follows:

“We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of ‘agriculture’ contained in section 3(f). In our opinion such employees are exempt.”

It is clear from this statement that the employees engaged in the above activities, all of which are not only performed in connection with the production and growing of agricultural commodities but are indispensable to such production and growing, are in the Administrator’s opinion exempt.

In addition to the opinion expressed in paragraph 12 of his *Bulletin* No. 14, the Administrator and his attorneys have expressed other opinions showing that any activities performed by the farmer or on the farm in connection with the growing and marketing of the farm’s crops are exempt. Thus they have held the following activities to come within the agricultural exemption.

(i) The erection of a silo on a farm by employees of an independent contractor. *Interpretative Bulletin* No. 14, par. 11.

(ii) The removal of stumps by employees of an independent contractor from cut over timber land owned by a lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees was necessary to the proper growth of the trees. WHMan. (1944-45) p. 592.

(iii) Sorting, grading, sizing and other practices performed on tobacco on the farm where grown by a company in the business of buying, warehousing and marketing tobacco, to which the farmer sells his tobacco. WHMan. (1944-45) p. 593.

(iv) Work on the farm by field men of a cannery to

which the farmer had contracted to sell his crops, notwithstanding such field men from time to time report to the canning plant. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.203.

(v) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.21.

(vi) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane, which fallen timber presented a fire hazard and an impediment to the cultivation of the land. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.252.

(vii) Vining of peas grown on a farm by a vinery located thereon. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.281.

(viii) Tobacco stemming by a farmer or on a farm. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.344.

4. Preparation for market of products grown on the farm.

In paragraph 10(b) of *Bulletin* No. 14 the Administrator stated:

“(b) The term ‘preparation for market’ must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. Grain, seed, and forage crops.—Weighing, binning, stocking, cleaning, grading, shelling, sorting, packing and storing.

2. Fruits and vegetables.—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, packing, storing, and canning.

3. Nuts (pecans, walnuts, peanuts, etc.).—Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. Sugar.—Manufacturing raw sugar, cane, or maple syrup and molasses.

5. Eggs.—Handling, cooling, grading, and packing.

6. Wool.—Grading and packing.

7. Dairy products.—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.

8. Cotton.—Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

9. Nursery stock.—Handling, wrapping, packaging, and grading.

10. Tobacco.—Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing.

11. Livestock.—Handling and loading.

12. Poultry.—Culling, grading, cooping, and loading.

13. Honey.—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.

14. Fur.—Removing the pelt, scraping, drying, putting on boards and packing.”

5. American farmers have relied upon the interpretations of the Administrator in regarding their various farm activities as exempt.

According to a press release issued by the Administrator at the same time as Interpretative Bulletin No. 14, the Administrator's interpretations of the agricultural exemption in the Act were made only after lengthy conferences with representatives of employers, employees and

other interested parties. Authorities of the United States Department of Agriculture were also consulted. Much time was devoted by the Administrator's attorneys to a study of the legislative history of Section 13(a)(6). The Administrator also had his economists make economic studies in order to assist in a proper determination of the scope of the exemption. It was only after these lengthy investigations and discussions that the Administrator announced his opinions on the subject. Such opinions were widely circulated through *Interpretative Bulletin* No. 14, press releases and other releases to the various labor law publications.

Once the Administrator's interpretations were announced, the farmers of America relied upon such interpretations and were guided by them in compensating their employees. And such interpretations as above set forth were never modified. Since they comport with the language and spirit of the exemption provisions they should be accorded the respect which the Supreme Court has said are due the Administrator's interpretations. *United States v. American Trucking Ass'n. Inc.*, 310 U. S. 534, 549. As the Supreme Court has also said, employers may properly resort to such interpretations for guidance. *Skidmore v. Swift*, 323 U. S. 134, 140. They should not be lightly discarded, as was done by the court below, in favor of wholly new interpretations, of which the farmer never before heard.

No. 11,952

IN THE

United States Court of Appeals
For the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY,
LIMITED (a corporation),
Appellant,

vs.

CIRACO MANEJA, et al.,
Appellees,

and

CIRACO MANEJA, et al.,
Appellants,

vs.

WAIALUA AGRICULTURAL COMPANY,
LIMITED (a corporation),
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

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IN THE
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For the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY,
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Appellant,

vs.

CIRACO MANEJA, et al.,

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and

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Appellants,

vs.

WAIALUA AGRICULTURAL COMPANY,
LIMITED (a corporation),

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

INTRODUCTION.

We adopt the statement in the brief for appellant and cross-appellee dealing with the nature of the action here involved, the jurisdiction of the Court, and the statutory provisions involved. Waialua

Agricultural Company, Limited, the appellant and cross-appellee in this action, will be referred to in this brief as "the appellant". Appellant's employees, the appellees and cross-appellants in this action, will be referred to herein as "the appellees".

STATEMENT OF THE CASE.

The appellees accept appellant's "Statement of the Case" as set forth in its brief at pages 3 to 11, without however accepting or endorsing the emphasis and significance placed by appellant on certain of the facts of the case.

QUESTIONS PRESENTED.

1. Are any of the appellees, or employees similarly situated, "employed in agriculture" as the term "agriculture" is defined in § 3(f) of the Fair Labor Standards Act (hereinafter referred to as "the Act"), and therefore exempt from both the minimum wage and overtime provisions of the Act as provided in § 13(a)(6) thereof?

2. If any or all of said employees are not so exempt, are any or all of them exempt from the overtime provisions of the Act, by virtue of § 7(c) thereof which provides that "in the case of an employer engaged * * * in the processing of * * * sugarcane * * * into sugar (but not refined sugar) or into syrup", the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged"?

3. If during the same workweek any appellee, or any other employee similarly situated, engaged in an activity exempt under § 13(a)(6) or § 7(c) of the Act and also engaged during such workweek in an activity not so exempt, is he nonetheless exempt for that workweek from the overtime provisions of the Act by virtue of § 13(a)(6) or § 7(c), or both?

4. Are any of the appellees, or those similarly situated, when they are engaged in any one week exclusively in the repair and maintenance of plantation houses and related domestic facilities, "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in §§ 3(b) and 3(j) of the Act?

SPECIFICATION OF ERRORS.

The District Court erred as follows:

1. In holding that appellant is entitled, pursuant to § 13(a)(6) of the Fair Labor Standards Act, to exemption from § 7(a) of said Act in respect of certain activities performed in or about the cane fields of appellant, which are not performed directly, proximately and immediately in and upon the actual production of sugar cane.

2. In holding that appellant is entitled, pursuant to § 7(c) of the Fair Labor Standards Act, to exemption from § 7(a) of the Act in respect of certain activities performed in or about the mill building of appellant, which are not performed directly, proximately and immediately in and upon the transforming of sugar cane into refined sugar.

CONTENTION OF THE PARTIES.

Appellees contend:

A. That none of the appellant's employees who are parties to this action, nor any other employees of appellant similarly situated, are exempt from the provisions of the Act by virtue of § 13(a)(6) or § 7(c), save as follows:

(1) Such employees are exempt under § 13(a)(6) of the Act during workweeks when they are engaged exclusively in work performed directly, proximately, and immediately in and upon the actual cultivation and tillage of the soil, and the cultivation, growing, and harvesting of sugar cane. In this connection appellees contend that harvesting of sugar cane is completed immediately upon the severance of the sugar cane from the earth so that where sugar cane is severed from the soil and thereafter placed into rail cars, the placing of the cane into rail cars is not harvesting and is not exempt.

(2) Such employees are exempt under § 7(c) of the Act only during those workweeks when they are engaged exclusively in tasks and duties performed directly, immediately, and exclusively in and upon the transforming of sugar cane into raw sugar. In this connection, appellees contend that the processing of sugar cane is commenced with the washing operation at the mill and is completed when the crystals of sugar are removed from machines and placed in either bins or bags. Hence tasks performed by said employees prior to the washing operation, as well as after the raw sugar is placed in the bins or bags, are

not exempt. Appellees further claim that none of said employees while working in and about appellant's mill during the off-season referred to in the Stipulation of Facts (R. 210-212) are exempt under § 7(c), nor are they exempt under said section during work-weeks during the grinding season when they perform any work in and about the mill during the 24-hour shutdown period referred to in the Stipulation of Facts. (R. 183-184.)

B. That all of the appellees, and all other employees of the appellant who are similarly situated, including those engaged in the maintenance and repair of appellant's dwelling houses and other facilities, are "engaged in commerce or in the production of goods for commerce" within the meaning of § 7(a) of the Act.

ARGUMENT.

I. THE FACTS.

The stipulation of facts (R. 129-256) describes in detail the operations of the appellant corporation and the activities of the appellees in relation thereto. Appellant's brief on file herein summarizes this document and no purpose therefore would be served by a duplication of this summary.

However, in order that the important questions presented in this case may be properly determined, it is essential that the Court have before it (1) a clear picture, not only of the operations of the particular corporation appellant here involved, but of

the entire sugar-producing industry in the Hawaiian Islands; (2) the relation of such industry to world production of sugar; and (3) the differences between the manner in which the industry is organized in the Territory of Hawaii and the organization thereof in the continental United States and Puerto Rico. For this reason, we summarize and quote briefly from Appellees' Exhibit No. 1 in evidence (Bulletin No. 687, United States Department of Labor, Bureau of Labor Statistics, entitled "Labor in the Territory of Hawaii"). We also refer on one occasion to an official government pamphlet entitled "The Economy of Hawaii in 1947, Bulletin No. 926", issued by the U. S. Department of Labor, copies of which have been furnished the Court by appellant. Brief reference is also made to certain portions of the stipulation of facts (R. 129-256) and the complaint (R. 3-20) which confirm the statements made in the official pamphlets referred to above.

1. **The growing, harvesting, and processing of sugar cane in the Hawaiian Islands is not seasonal in nature, but is a day-and-night, year-around operation, except for the three months so-called "off-season" and the weekly 24-hour shut-down period.**

This is admitted on page 65 of appellant's brief wherein it is stated: "Nor is the industry in Hawaii, which is engaged in processing sugarcane into raw sugar, in fact a seasonal one."

On page 57 of Bulletin No. 687, we find the following statement:

"Employment in the production of sugar in Hawaii continues throughout the year. In this

respect it is more like employment in *manufacturing operations*, with moderate seasonal fluctuations, than like agricultural occupations in the United States." (Emphasis added.)

Paragraph 20 of the stipulation of facts (R. 183) states as follows:

"Production in the mill operations is keyed basically to a six-day week with continuous and around-the-clock operations, the mill stopping the grinding of cane at 2:00 p.m. on Saturdays and starting up at 2:00 p. m. on Sundays. The 24-hour day is divided into three 8-hour shifts running from 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m."

The harvesting of sugar cane goes on day and night during the processing season. (R. 156-157.)

2. The production of sugar in the Hawaiian Islands is a highly centralized, mechanized, integrated and scientifically controlled operation. It is in fact a "factory" operation and not a "farm" operation.

We quote from pages 13 and 14 of Bulletin No. 687:

"* * * life on all of the plantations follows a substantially similar pattern. This is the result of several generations of experimentation. Due to the coordinating influence of the Hawaiian Sugar Planters' Association, whenever a good workable method was found by one plantation, it was quickly adopted by all the others, thus gradually developing a common pattern for plantation organization.

"The head of the plantation is the manager, who is generally appointed by the controlling

'factor' or agency. He has wide authority, not only over the agricultural and industrial production, but also over the general recreational program and other activities of the community. The plantations range in value from about 4 to 10 million dollars each, and the managers must be men of training and ability.

"* * * They (plantation managers) are clearly recognized as the final source of authority in all aspects of plantation life."

* * * * *

"The timing of each step in the process of sugar production is extremely important. There is a definite optimum time for each operation, when the expenditure of man-days of labor, the use of machines, or of materials such as fertilizer or irrigation water, will be more productive in terms of yields and cost than if the work is done at any other time. It must also be remembered that, since cane cannot be stored for more than 2 or 3 days without spoiling, the planting and production schedule must be such that enough cane will continue to appear at the mill, day after day, to keep it operating on a full schedule.

"* * * Moreover, since cane requires from 14 to 22 months to reach maturity, plans must be projected a year and half or more in advance. Thus the organization and planning of plantation operations is an exceedingly detailed and complicated problem.

* * * * *

"The central business offices, usually located in the heart of the plantation community, maintain detailed records not only of the costs of production by fields, but also of the operations that have

already been applied to each field, as well as a projected plan for future operations, with indications of the exact time when they must be undertaken.

* * * * *

“Thus the structural organization and functioning of a plantation is not unlike that of an army, with its clearcut lines of authority and its careful program for attaining given objectives
* * *” (Emphasis added.)

The size and degree of mechanization and integration of appellant's operations are indicated by the following figures:

The appellant corporation produces sugar cane on 9,663 acres of land. (R. 133.) On September 1, 1946, it employed 1,144 employees in connection with its manifold and varied operations in the District of Waialua. (R. 136.) In 1945, it produced 56,193 tons of raw sugar. (R. 132.) Appellant operates a railroad consisting of 56 miles of main line track and 9.34 miles of portable track. In connection with this extensive railroad system it operates six 25-ton steam locomotives, one 17-ton steam locomotive, one 12-ton steam locomotive, one 12-ton gasoline locomotive, and one 14-ton diesel locomotive, 200 steel cane cars and 512 wooden cane cars. (R. 158-163.)

See Appendix A (p. i, *infra*) for a description of the highly industrialized and synchronized operation of producing raw sugar from sugar cane in the Territory, as set forth in Bulletin 687.

In paragraph 33 of the complaint (R. 30) there is set forth a table which shows in dramatic form the

tremendous increase in mechanization and improvement in technology which has taken place in the last three decades. The table shows that whereas in 1910 it took 21.2 man days for appellant to produce a ton of raw sugar, in 1945 it required only 4.9 man days to achieve the same result.

In short, as stated at page 36 of the aforementioned Bulletin No. 926, "operational problems on a sugar plantatiton are comparable to those of a Detroit factory rather than those of an Iowa farm."

3. The "Company Town", including recreational and other facilities, is developed to a point unique in the industrial world.

For a description of appellant's "Company Town" see Appendix "B". (p. iii, *infra*.) The quotations are from the record, pages 31, 32, 32, 34 and 35.

4. The sole and only purpose of the industry is the production of raw sugar and ultimately refined sugar. The operation of the mill is not, as claimed by appellant, incidental to the growing of cane, but in fact the growing of the cane is subordinated to, and is synchronized with, the needs and capacities of the mill.

On page 21 of Bulletin 687, we find the following statement:

"Mill operations.—The plantation mill, with few exceptions, operates on a 24-hour schedule of three 8-hour shifts. There must therefore be a constant flow of cane into the mill. The careful planning of the planting and harvesting schedules involving the many operations described above is all designed to that end."

And at page 24:

“In Hawaii the growing of cane and manufacturing of raw sugar are combined in a single plantation, *based on a carefully planned planting and harvesting program to provide a continuous flow of cane into the mill.* Under these conditions small scale operations are inefficient. In other sugar-producing areas, where small scale farming persists, there is naturally a sharp line of demarcation between the growing of sugar cane and its processing, the farmers selling to the processors.” (Emphasis added.)

5. **The Hawaiian sugar industry, in its organization and techniques, is vastly different from that of other sugar-producing areas.**

Bulletin 687, page 23:

“The Hawaiian sugar industry is more completely integrated than that of other sugar-producing areas. There are a number of reasons for this. In Louisiana, Puerto Rico, the Philippines, and even in the sugar beet areas, a farming system existed prior to the growth of the sugar industry. Farmers already controlled the land and turned to cane or beets because they became profitable crops. Sugar production in those areas thus grew along the lines of the established small farming system.

“The Hawaiian sugar industry, however, began on land which was relatively undeveloped. The taro patches cultivated by the native Hawaiians were on lands unsuitable for sugar. The areas now occupied by the 38 sugar plantations were, for the most part, (1) forest land, (2) useless arid land, or (3) semiarid pasture land.

“The land tenure system is quite different from that in any other part of the United States and is a legacy of the feudal system under native royalty which preceded annexation. At that time such lands as were suitable for sugar cultivation were owned in large tracts and were, therefore, leased or purchased in large tracts for plantation purposes. Nearly half of the land is still leased (table 6). Hawaiian sugar production from its very inception was on a larger scale than is typical of mainland farming. As the plantations have decreased in number, the output of the industry as a whole has increased in value.

* * * * *

“For the following reasons the trend is toward even larger plantation units:

“(1) In Hawaii the growing of cane and manufacturing of raw sugar are combined in a single plantation, based on a carefully planned planting and harvesting program to provide a continuous flow of cane into the mill. Under these conditions small scale operations are inefficient. In other sugar-producing areas, where small scale farming persists, there is naturally a sharp line of demarcation between the growing of sugar cane and its processing, the farmers selling to the processors.

“(2) The arid and semiarid lands, which constitute over half of the area now under cane cultivation, required the construction of large irrigation systems too costly to be undertaken except by large-scale enterprises, or by governmental or collective action.

“(3) Unlike other areas, the cane crop of Hawaii takes 14 to 22 months to mature. It

needs a much greater quantity of fertilizer per acre. Because of the topography, it requires expensive systems of transportation between field and mill. To accomplish these ends requires a large capital outlay and involves risks more readily carried by large-scale corporate units."

It will be especially noted that the production of sugar in the Territory, unlike other sugar-producing areas, is not based on a "farm" economy.

And from page 70 of Bulletin No. 687 we quote as follows:

"The typical Hawaiian sugar plantation is a small world in itself, consisting of (1) the plantation town, which includes stores, clubs, a motion-picture theater, a recreation field, hospital, and such services as electric lighting, a water system, police and fire protection; (2) a transportation system, including trucks, tractors, and in most cases a railroad; (3) the plantation land area, only about a third of it devoted to sugar, the remainder including some unused wooded land, a small dairy or ranch, an area set aside for diversified crops, and the plantation town itself; (4) repair shops with expert mechanics for the maintenance of trucks, tractors, railroad equipment, and mill machinery; (5) the sugar mill; (6) the central office of the management where continuous and remarkably detailed records covering every aspect of the plantation are kept."

6. The "agency" or "factor" system which prevails in the Hawaiian Islands concentrates control of virtually the entire sugar production in the hands of five business groups known as "The Big Five."

While the appellant alone produced in 1945 only 7% of the raw sugar produced in the Hawaiian Islands (Stip. of Facts, p. 3), this figure is misleading as to the size and importance of appellant's operations because of the prevailing "agency" or "factor" system which is peculiar to the Hawaiian Islands. Under this system, all of the sugar plantations (with perhaps a single and unimportant exception) are controlled by one of five corporate factors or agents. The appellant is controlled by Castle & Cooke, Ltd. (Bulletin 687, p. 28.) Actually appellant and the two other plantations controlled by Castle & Cooke, Ltd., produced in 1938 (the last year for which figures are available to us) approximately 15½% of all of the raw sugar produced in the Hawaiian Islands.

For a description of the agency system, as set forth in Bulletin No. 687, at pages 26, 27, and 28, see Appendix C (p. vi, *infra*).

7. **The Hawaiian Sugar Planters' Association.**

All of the sugar producers in the Islands (with the unimportant exception of three small ones) are members of the Hawaiian Sugar Planters' Association. For a description of this organization, we quote from pages 28, 29, and 31 of Bulletin No. 687:

"The Hawaiian Sugar Planters' Association represents a further step in coordination. Its function is to unify policies in the Hawaiian sugar

industry as a whole relative to (a) the discovery and adoption of new agricultural techniques; (b) the invention and adoption of labor-saving equipment; (c) effective representation of the Hawaiian viewpoint relative to Territorial and Federal legislation affecting sugar; (d) the formulation of a general labor program relative to wages, hours, and working conditions, including plans for the promotion of general welfare on the assumption that the welfare of Hawaii is the welfare of the sugar industry.

“* * * A further step in the integration of the Hawaiian sugar industry was taken when three of the large sugar agencies instituted a joint program for refining and marketing the bulk of the Island sugar. Under this plan over half of the total production (about 550,000 tons annually) is refined by the California and Hawaiian Sugar Refining Corporation. *The stock in this corporation is owned by 33 of the Hawaiian plantations, and its management is under the direction of officials of the sugar agencies in Honolulu.* About 100,000 additional tons are annually refined by the Western Refinery and 300,000 tons by the National Sugar Refineries in New York. But all of it is marketed under an agreement whereby all sugar producers in the Hawaiian Sugar Planters' Association use the same marketing organization and receive the same price per ton. Thus the integration of the Hawaiian sugar industry has been carried to its ultimate step in the refining and marketing of the product on the mainland.” (Emphasis added.)

It is a matter of record in this case (Appellees' Ex. 4) that appellant is one of the owners and mem-

bers of the California and Hawaiian Sugar Refining Corporation, which operates a large sugar refinery at Crockett, California. This fact also belies the impression being carefully nurtured by appellant in this case that it is merely a "farmer" engaged only in growing sugar cane and processing the same into raw sugar.

As to the importance and size of Hawaiian refined sugar production, we refer to appellant's Complaint. (R. 10.) It is there stated that between 1941 and 1945, the Territory produced between 10.76% and 13.3% of all sugar, both beet and cane, distributed for consumption in the United States.

Conclusion.

The production of sugar in the Hawaiian Islands is actually one huge "factory" operation, rigorously controlled by a small group at the top and bearing no real relation to "farming" or to "farmers" as the terms are known, used, and commonly understood in the United States by the "man in the street" and by members of the Congress which enacted the Fair Labor Standards Act.

II. WE PROCEED NEXT TO A DISCUSSION OF APPELLANT'S CONTENTION THAT ALL OF THE APPELLEES, AND THOSE SIMILARLY SITUATED, ARE ENGAGED IN "AGRICULTURE", AS THAT TERM IS DEFINED IN § 3(f) OF THE ACT, AND ARE THEREFORE EXEMPT FROM BOTH THE MINIMUM WAGE AND OVERTIME PROVISIONS THEREOF.

The word "agriculture" is defined in § 3(f) as follows:

“(f) ‘Agriculture’ includes *farming* in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a *farmer* or on a *farm* as an incident to or in conjunction with such *farming operations*, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” (Emphasis added.)

A. The Legislative History of the Exemption.

Appellant devotes considerable space in its brief and places great reliance upon the Congressional discussion which preceded the adoption of the “agriculture” exemption in the Act. Carefully selected excerpts from the discussion are quoted in an attempt to convince this Court that Congress intended the “agriculture” exemptions to apply to all of the many and varied operations of the appellant corporation as “performed by a farmer or on a farm as an incident to or in conjunction with * * * farming operations.”

The Congressional debates do not support appellant’s contentions in this regard.

1. It is clear from a reading of the debates that when reference was made therein to sugar, the sena-

tors and congressmen were discussing the methods prevailing in the sugar producing areas of the southern states. The only occasion when sugar processing was mentioned was when the question was raised by Senator Overton of Louisiana, and he was, of course, referring to the situation prevailing in his state, where much of the sugar cane is raised by small individual farmers, many of whom process the cane themselves. At no time during the debate was there any reference to the highly integrated and industrialized sugar industry as it exists in the Hawaiian Islands. The senators and congressmen were talking about "farms". For example, in the course of the discussion, Senator Black stated as follows (81 Cong. Rec. 7657), "* * * the bill does provide that those things done with reference to commodities produced on the *farm* by a *farmer* are not included in the possible application of Act by the board". (Emphasis added.)

2. The question of whether the *processing* of sugar cane would be exempt under the "agriculture" exemption was left unanswered by the debate. See the following colloquy between Senators Overton and Black (81 Cong. Rec. 7658) wherein Senator Black refused to answer in the affirmative Senator Overton's question whether the processing of sugar cane when performed by the farmer himself, would be considered within the "agriculture" exemption:

"Mr. Overton. As I understand the Senator, in cases where some farmers process their own products and other farmers carry their products to some processor to be processed, then by rea-

son of the fact that some farmers carry their products to a processor to be processed, the farmers who process their own products would not be considered as engaging in a practice which is ordinarily incident to farming operations.

“Mr. Black. I could not say as to that. It depends altogether on the facts as to what is a necessary incident to farming. As I said, there are some things so far removed from farming that all of us would know instantly they did not constitute a farming operation. The illustration I gave was of a farmer erecting on his farm a factory and manufacturing anything you please, whether something he grows or not, who employs many people to manufacture it, and then ships it in interstate commerce. The mere fact that he has such a plant on his farm would not make the manufacturing of shirts, for instance, a farming operation. It would still be a manufacturing operation. The same reasoning would apply to any other process of manufacturing.”

On page 40 of its brief, appellant refers to certain statements made recently by appellees' union before two legislative committees which were considering revisions of the Act. Excerpts from the statements are set forth in appellant's brief at page 93. These statements refer merely to the Act *as presently interpreted by the employers*. In these statements the union is not conceding that these interpretations are correct and will be sustained by the Courts. We might point out, however, that *any* interpretation placed upon a provision of the Act by the trade union to which appellees belong would be completely irrele-

vant and in no way binding upon this or any other Court. *Bay Ridge Operating Co. v. Aaron*, 92 Law. Ed. Adv. Opinions 1146, 1152; 68 S. Ct. 1186.

3. The most conclusive evidence that Congress did not intend the "agriculture" exemption to extend to the processing of raw sugar is the fact that it expressly exempted such processing from the overtime provisions of the Act (but not the minimum wage provisions thereof) in § 7(c). (*Bowie v. Gonzalez* (C.C.A. 1), 117 F. (2d) 11, 17, hereinafter discussed more fully.)

B. The conclusion appellant attempts to draw from the Congressional debate is not supported by the Administrator's interpretations.

Appellant discusses at length Interpretative Bulletin No. 14, issued August 21, 1939, which sets forth the administrator's opinion as to the meaning and extent of the "agriculture" exemption. It should be noted that this bulletin was issued less than one year after the Act became effective, and before there were any authoritative Court decisions construing the provisions thereof.

It is true that Bulletin No. 14 (Par. 10(b)) states that in the opinion of the administrator, "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term (Practices * * * performed by a farmer)." The bulletin also states that, in the administrator's opinion, "manufacturing raw sugar, cane or maple syrup and molasses" *when performed by a farmer*, consti-

tutes "preparation for market" as used in the Act's definition of "agriculture".

However, after the decision in January, 1941, of the First Circuit Court of Appeals in *Bowie v. Gonzalez*, 117 F. (2d) 11 (hereinafter more fully discussed), the administrator reversed his opinion, declaring that henceforth the exemption did not apply to mill workers although the mill owner was grinding only cane produced by himself. (2 C.C.H. Labor Law Service, par. 25,651.70.) Even prior to such reversal, the administrator held that the exemption did not apply to a mill owner grinding cane produced by others.

The statement in Bulletin No. 14 that the transportation of a mill operator's own cane to his mill constitutes "agriculture" must therefore be disregarded, because it is contrary to the decision of the First Circuit Court of Appeals in *Vives v. Serrales*, 145 F. (2d) 552 (hereinafter discussed at length) handed down after Bulletin No. 14 had been issued.

In considering Bulletin No. 14 it should also constantly be kept in mind that the administrator was discussing "farmers" and "farms" as those terms are known in the continental United States and he obviously did not have in mind the huge, highly mechanized and integrated factory operations in the Territory of Hawaii. In this connection we quote from Section 10 of Interpretative Bulletin No. 14:

"It should be noted with respect to all of these practices that they must be performed by the *farmer* and his employees and that such prac-

tices must be incident to or in conjunction with the *farming operations* of the *farmer*. It makes no difference whether they are performed on or off the *farm* if performed by a *farmer*. The line between practices which are incident to or in conjunction with *farming operations*, and those which are not, is not susceptible of precise definition. The agricultural exemption, however, would seem to include only practices which constitute a subordinate and established part of the *farming operations*. Factors that would indicate that the practices performed by a farmer are thus subordinate would be, among other things, that most of the employees engaged in such practices are normally employed also in *farming operations* upon the *farm*, and that these practices occupy only a minor portion of the time of the *farmer* and such employees and do not constitute the *farmer's* principal business." (Emphasis added.)

To call appellant in this case a "farmer" and its huge plantation, factory and company town a "farm", is to rob these words of their historic meaning.

In support of appellant's contention that its office and maintenance workers are also engaged in "agriculture" appellant quotes from Paragraph 12 of Bulletin No. 14, reading as follows:

"We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in Sec. 3(f). In our opinion such employees are exempt".

However, in the case at bar only a portion of the time of appellant's office and maintenance workers is related to the actual cane production operation. Much of their time and effort is related to activities having nothing to do with the production of cane. (See Stipulation of Facts, R. 235, 241-251, 253.) Obviously the administrator's statement refers to office and maintenance workers functioning exclusively with reference to farming operations.

C. The cases.

There have been to date only four Circuit Court decisions dealing with the Fair Labor Standards Act and sugar cane, all of them rendered by the First Circuit Court of Appeals.

Bowie v. Gonzalez (C.C.A. 1), 117 F. (2d) 11. In that case the appellants operated sugar mills in Puerto Rico which crushed cane grown not only by them, but also by independent growers known as "colonos". The appellants contended that their employees engaged in transporting the cane to the mills, in processing the cane at the mills, and in transporting the raw sugar to storage and marine terminals were "employed in agriculture" and thus exempt from the minimum wage provisions of the Act. In a lengthy and carefully reasoned opinion, the Court rejected this contention. In so doing, it made the following significant observation (pp. 16, 17):

"* * * Being a remedial statute, the appellants must bring themselves within both the letter and spirit of the exceptions since they are subject to a strict construction. *Fleming v. Hawkeye Pearl*

Button Co., supra; cf. *Morris Canal Co. v. Baird*, 1915, 239 U.S. 126, 36 S. Ct. 28, 60 L. ed. 177; *Citizens' Bank v. Parker*, 1904, 192 U.S. 73, 85, 24 S. Ct. 181, 48 L. ed. 346.

* * * * *

“The appellants contend that their employees engaged in the production and transportation of raw sugar are engaged in ‘agriculture’ within the meaning of Section 13(a)(6) and Section 3(f) and are thus entirely exempt from the Act. It is agreed by both parties that those employees engaged in the production and harvesting of sugar cane are clearly engaged in agriculture. The only dispute involved those employees engaged in the mills and the transportation facilities. It is our opinion that the latter are not engaged in ‘agriculture’ as defined in the statute.

* * * * *

“The most convincing argument that the processing of sugar cane into sugar was not included within the term ‘agriculture’ is found in the provisions of Section 7(c). All the sections relating to exemptions are in pari materia and must be construed together to form a consistent whole, if possible. Section 7(c) exempts from the hours provisions of the Act the processing of sugar cane into sugar. If such processing is included within the term ‘agriculture’ it would be entirely exempt from the Act and the specific inclusion of such processing in the exemptive provision of Section 7(c) would be unnecessary. But the construction of the word ‘production’ in Section 3(f) to mean agricultural production is entirely consistent with Section 7(c), which provides specific exemptions for certain detailed processing of agricultural commodities.”

For additional excerpts from the Court's discussion, see Appendix D, p. ix, *infra*.

This same case again came before the First Circuit Court (*Gonzalez v. Bowie*, 123 F. (2d) 387) on an appeal by the employees. They contended that the District Court, on remand from the decision of the Circuit Court in the first case, was in error in holding that employees engaged in transporting the *employers'* sugar cane to the employers' mills were exempt because "employed in agriculture". The Circuit Court in the later decision refused to revise the ruling of the District Court in this respect only, however, because the District Court in its first decision had made the same ruling and the employees had not appealed therefrom. The Circuit Court stated at page 391:

"The district judge was correct in refusing to hold that the judgment should include those employees engaged solely in the transportation of the sugar cane of the employers. This group was clearly excluded from the protection of the Act by the original judgment of the district court. From that judgment the employees took no appeal and any issue with respect to the status of this group of employees consequently was not before us on the prior appeal."

Thus, in neither the first nor second *Bowie* case did the Circuit Court pass upon the question of whether the transportation of the employer's cane to the mill came within the "agriculture" exemption.

Next came the case of *Calaf v. Gonzalez*, 127 F. (2d), 934.

The question involved in that case was (page 936):

“* * * whether the employees who are engaged in the transportation of sugar cane from the farms of the defendants, who are the joint owners of the farms, the mill and the railroad system, and the employees who are engaged in the repair and maintenance of such transportation facilities are covered by the Act.”

The Court stated that it could hold all of these employees as non-exempt on the ground that it was not possible to segregate the operations as they pertained to the farms of the employers and as they pertained to the production of the independent farmers or colonos. However, the Court declined to rest its decision on this narrow ground, stating as follows at pages 936, 937 and 938:

“* * * *We place our decision, however, on the broader ground that the transportation of sugar cane is incident to milling rather than to farming and therefore is not exempt under the Act.* (Emphasis added.)

“The scheme of the Fair Labor Standards Act of 1938 is broad and comprehensive with the purpose of including all employees engaged in interstate commerce or in the production of goods for commerce, except those specifically exempted. The Act is remedial in its nature and should be liberally construed and the exceptions to the coverage of the Act should be narrowly construed. * * * It is clear from the quoted section (§ 3[f]) that in order for an operation to be exempt from the application of the Act it is necessary that it be a farming operation, or incident to farming.

What is incident to farming must be determined upon the basis of all the pertinent facts in the case, always keeping in mind the purpose of the Act and the circumscribed nature of the exemptions * * *

“The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation an incident to farming. The issue, therefore, is not whether the same owners manage and control the farms and the transportation system but rather whether transportation is incident to farming or incident to milling, an operation specifically within the purview of the Act.

“* * * There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provisions of the Act. We, therefore, hold that all the employees before us are covered by the Act.”

The most recent case is *Vives v. Serralles* (C.C.A. 1), 145 F. (2d) 552. It is relied on by appellant to support its contention that the transportation of cane from the fields to mill in the case at bar comes within the agricultural exemption. Far from giving comfort to appellant, the case supports the decision of Judge Metzger below.

In the *Vives* case, all of the sugar cane processed at the employer's mill was grown by the employer

on various farms owned by him. The employer maintained a permanent railroad transportation system which picked up cane from "concentration points" on the outlying farms and transported it to the mill. The cane was hauled by the harvesters thereof to the "concentration points" on the outlying farms by means of ox carts, railroad cars pulled by oxen on portable tracks laid in the fields, and by means of steel cars pulled by tractors to the "mainline". The railroad cars would then be switched on to the mainline and hauled away by the mainline's locomotives. The cane pulled to the mainline in ox carts was dumped thereat and reloaded onto the mainline's cars. The cane hauled to the mainline in steel cars was reloaded into mainline cars by means of mechanical hoists.

On the particular farm on which the mill was located, the cane was hauled by the farm workers direct to the mill's conveyor belt in the same fashion as the cane produced on the outlying farms was hauled to the mainline "concentration points."

The Court held that the farm workers on the outlying farms engaged in hauling the cane to the railroad "concentration points", and the farm workers on the farm on which the mill was operated engaged in hauling the cane direct to the mill, were exempt from the Act under § 13(a)(6) of the Act.

The Court distinguished the *Calaf* case as follows (pp. 554, 555):

"This court held in *Calaf v. Gonzalez*, 127 F. (2d) 934, '936, that employees engaged in the

transportation of sugar cane from the farms of employers, who were the owners of the farms, the mill and the railroad system, were covered by the Act. In that case we said that 'we place our decision, however, on the broader ground that the transportation of sugar cane is incident to milling rather than to farming and therefore is not exempt under the Act.' The plaintiffs evidently rely on that language. But in the Calaf case the plaintiffs were engaged in the operation, repair, and maintenance of the company railroad in such types of work as the construction and repair of rolling stock, splitting wood for engines, repairing main railroad lines, signaling at railroad crossings, fireman and brakeman on the locomotive. We were not merely verbalizing a distinction in saying that 'transportation * * * is incident to milling rather than to farming'. *We pointed to the following guides in reaching our decision: 'the workers are all employed by the central. Their names are found on the payroll sheets of the central. * * * The locomotives and the cars move from the mill to the farms and back. The persons engaged in the transportation of sugar cane do no agricultural work.'* (Emphasis added.)

"In this case the defendant contends that it owns many farms where it is engaged exclusively in the planting, cultivating, and harvesting of sugar cane; that once that is done transportation enters, and after transportation, milling, but before the sugar cane can begin to move over the transportation system to the mill it must first be gathered in and brought to concentration points at the defendant's farm units.' So far as the

plaintiffs in group one are concerned, their activities begin at a point when the sugar cane has been cut in the field and continue up to the concentration point. To extend coverage to them involves broadening the concept of 'transportation' so as to include the activities of workers right in the fields at a point just short of the actual cutting of the cane. So far as group two is concerned, the problem is the same. * * * The situs of the activities in which these plaintiffs were engaged is the field. If we rested our decision on the rationale of the *Calaf* case we would hold the concentration point as the line of demarcation between 'transportation as an incident to milling' and 'transportation as an incident to farming'."

Appellant draws a completely erroneous conclusion from the *Vives* case.

"* * * the case must be regarded as authority for the proposition", says appellant, "that where, as here, an employer's total operations take place on the farm where he grows cane and transports and grinds same into raw sugar, all such operations are within the agricultural exemption." (Appellant's Brief, p. 44.) The case stands for no such proposition. The case at most stands for the proposition, which we think to that extent erroneous, that transportation operations preceding the loading of cane into cars of the "main-line" or permanent railroad, and the switching of cars onto such line, are within the agriculture exemption. The Court carefully points out (p. 554) that it is not changing the rule of the *Calaf* case that em-

ployees engaged in transportation activities, that is, activities in connection with the "mainline" or permanent system, are not engaged in agriculture. A careful reading of the *Vives* case fails to disclose any language by way of *dicta* or otherwise which even remotely supports appellant's conclusion. As to operations within the mill being within the agricultural exemption, as claimed by appellants, we wish to point out that one of the workers involved in the *Vives* case was a mill worker named Lawreano Vargas, and there was no contention made that he was engaged in "agriculture", and thereby exempt under § 13(a)(6). The only question as to him was whether he came within the processing exemption of § 7(c).

In the case at bar we do not have the "concentration point" system which prevailed in the *Vives* case. It therefore seems clear that "transportation", as distinguished from "harvesting", begins in our case at the time the cane is placed in the railroad cars in the fields. To that extent we do not agree with the trial Court's decision that "agriculture" continues until the loaded cane cars are hauled from the field and reach the "mainline" railroad. Our position in this regard is borne out by the fact that in the *Vives* case the Court was impressed by the fact that there the cane was produced on numerous individual and separated farms, these farms being administered separately from the mill operations, although all were under one ownership. The workers held exempt under § 13(a)(6) were all carried on farm payrolls as distinguished from the mill payroll. This is not

true in the case at bar. Furthermore, as heretofore pointed out, the highly industrialized and integrated factory operations of the appellant in this case, including the growing and harvesting of sugar cane, cannot be held to constitute a "farm" in the usual and traditional sense of the word. Nor can we lose sight of the further distinguishing features heretofore discussed, such as appellant's sugar refining activities (Appellee's Ex. 4), etc.

McComb v. Consolidated Fisheries Co., 75 F. Supp. 798 (D. Del. 1948) cited by appellant at page 42 of its brief, is not in point. That case involved the fishing industry exemption (§ 13[a][5]), which is much broader than is the "agriculture" exemption, and extends by express wording to the "processing * * * canning * * * curing * * * storing" of fish and by-products thereof.

We find nothing in the holding in *Damutz v. Pinchbeck* (C.C.A. 2), 158 F. (2d) 882, cited by appellant on page 16 of its brief, which is contrary to the decision of the lower Court in the case at bar. The employer in that case operated two greenhouses in connection with a wholesale floral business. The employee involved fired the boilers which supplied heat to the greenhouses. The Court held this employee to be exempt under § 13(a)(6). We fail to see any support in this decision for appellant's contentions that the mill and railroad employees of the appellant come within the "agriculture" exemption.

Under the well-established rules concerning statutory construction of exemption provisions, and keep-

ing in mind the remedial nature of the Act, it seems clear that only those of appellant's employees whose activities relate directly to the preparation of the earth for sugar cane, the planting, watering and weeding thereof, and the severing of the cane from the ground, are employed in "agriculture" as that term is defined in the Act.

III. WE COME NOW TO APPELLANT'S CONTENTION (APPELLANT'S BRIEF, p. 51) THAT ALL OF THOSE APPELLEES ENGAGED IN THE TRANSPORTATION OF CANE TO THE MILL, THE PROCESSING OF CANE INTO RAW SUGAR AT THE MILL, AND IN INCIDENTAL AND RELATED ACTIVITIES, INCLUDING MAINTENANCE AND REPAIR WORK, ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT, PURSUANT TO § 7(c) THEREOF. APPELLANT FURTHER CONTENDS THAT THIS EXEMPTION APPLIES EVEN DURING THE SO-CALLED "OFF-SEASON" (DESCRIBED IN THE STIPULATION OF FACTS [R. 210-215]), AND ALSO DURING THE 24-HOUR WEEKLY SHUT-DOWN PERIOD DURING THE PROCESSING SEASON FROM 2 P.M. SATURDAY TO 2 P.M. SUNDAY.

Section 7(c) provides that "In the case of any employer engaged in the 'processing of * * * sugar cane * * * into sugar (but not refined sugar) * * *' the provisions of subsection (a) (of § 7) shall not apply to his employees in any place of employment where he is so engaged."

A. The "Off-Season".

We deal first with appellant's contention that the § 7(c) exemption applies even during the so-called "off-season", during which extensive repairs are made to the mill equipment, and no raw sugar whatsoever

is produced. During the years 1941 to 1945 inclusive, the "off-season" in appellant's operations averaged between $3\frac{1}{2}$ and 4 months in duration, terminating around the middle of January of each year. (R. 28.) No cane is harvested, transported, or processed during the off-season. (R. 28.)

In *Maisonet v. Central Coloso, Inc.* (D.P.R. 1942), 2 W.H.C. 753, the United States District Court for Puerto Rico had this precise question before it. In Puerto Rico, as in the Territory of Hawaii, a substantial period occurs during each year when the sugar mills are closed down for repairs and no raw sugar is produced. The employers nonetheless contended that the § 7(c) exemption applied during the "off" or "dead" season. The Court rejected this contention, stating at pages 755 and 756 as follows:

"The primary purpose of the exemption in question is to permit the employment of persons in seasonal industries, particularly where perishable commodities such as sugar cane are concerned, without the hardship of paying overtime. 'Sugar cane is highly perishable and must be ground very soon after it is cut' (Bowie v. Gonzalez, 117 F. 2d 11, 14 [1 WH Cases 99, 100]). But this situation does not obtain during the dead season. There is no similar reason why employees should work more than 40 hours in 'construction and repair work and preparation of the mill for the coming grinding season (zafra).' "

* * * * *

"The administrator, who has filed a brief as amicus curiae, cited Fleming v. Hawkeye Pearl

Button Co., 113 F. 2d 53, 57 [1 WH Cases 81, 85] (C.C.A., 8th Cir.) as authority for his contention that 'proceeding should be limited to these activities which have to do with the conversion of sugar cane into raw sugar and those operations which are so related thereto that they should be considered to have been included.' The Administrator's position seems well taken. In addition to the fact that employees working during the dead season do not come within the purpose of the exemption, it would seem, under the rule of strict construction of exemptions, that during the time these employees work in repair and maintenance, their employer is not 'engaged in the processing of sugar cane into sugar.' "

To the same effect, see *Heaburg v. Independent Oil Mill, Inc.* (W.D. Tenn., 1942), 2 W.H.C. 655, and *Abram v. San Joaquin Cotton Oil Co.* (S.D., Cal., 1943), 49 F. Supp. 393. Both these cases involved the processing of cottonseed, but the principle involved is the same.

While these cases are of course not binding on this Court, the appellant presents nothing substantial in its brief by way of argument or facts which would support a different interpretation of § 7(c) for the sugar producers in the Territory of Hawaii. Appellant lays great stress on the word "where" in § 7(c) and argues that it doesn't matter what kind of work a man is performing so long as he is performing it in a place where cane processing also takes place from time to time. Carried to its logical extreme, appellant's argument would mean that if appellant decided

to manufacture shoes in its mill during the off-season, or as an adjunct to its cane processing during the processing season, the men engaged in the shoe end of the business would also be covered by the sugar processing exemption.

As pointed out by Judge Metzger in his opinion, the case of *McComb v. Consolidated Fisheries Co.* (D. Del. 1948), 75 F. Supp. 798, does not support appellant's contention because in that case the evidence disclosed that processing continued even during the so-called "clean-up" period.

Appellant's lack of confidence in its position with respect to the "off-season" work is further demonstrated by the fact that appellant is now, and has been for a number of years, paying its employees during the "off-season" the overtime compensation required by § 7(c) of the Act. (R. 79-80.)

The mill is also shut down completely each week for a 24-hour period commencing at 2 p.m. Saturday and ending at 2 p.m. Sunday. (R. 183-184.) During this period no processing is carried on and a reduced crew performs purely repair and clean-up work. It follows from the cases heretofore cited with reference to the "off-season" that during the weekly 24-hour shutdown period, when cane is not being processed, the § 7(c) exemption likewise does not apply. The only answer appellant makes to Judge Metzger's decision in this regard is that to sustain it would mean that a number of appellant's employees would lose the processing exemption and would be covered by the

Act. (Appellant's Brief, p. 64.) We fail to see the relevancy of this argument.

We submit that the trial Court's decision that none of the appellees are subject to the § 7(c) exemption during the off-season, or while they are engaged in the week-end repair work, is a correct and logical one. To hold otherwise would subvert the broad social purposes to the Act.

B. The transportation of sugar cane to the mill.

Appellant cites *Calaf v. Gonzalez* (C.C.A. 1), 127 F. (2d) 934 (cited by appellant as *Collazo v. Gonzales*), as authority for the proposition that its transportation employees are exempt under the "processing" exemption. (See p. 57 of Appellant's Brief.) The *Calaf* case stands for the very reverse of this proposition. In that case the question presented to the 1st Circuit Court was whether the District Court for Puerto Rico was correct in holding that employees engaged in the transportation of sugar cane to the mill, and those engaged in the repair and maintenance of transportation facilities, were subject to the Act. The lower Court held that neither the "processing" nor the "agriculture" exemption applied to these employees. The Circuit Court affirmed the decision of the District Court, holding that transportation was *incident* to the mill operation, and did not come within the "agriculture" exemption. The correctness of the District Court's decision that these employees were not subject to the "processing" exemption was not attacked on the appeal nor even discussed by the Cir-

cuit Court for the obvious reason that these operations do not take place in the "place" where the processing operation takes place and hence are clearly outside the exemption.

Appellant in its brief (pp. 56, 57) also cites *Bowie v. Gonzalez* (C.C.A. 1), 117 F. (2d) 11, as standing for the proposition that the transportation employees are within the § 7(c) exemption. The *Bowie* case did *not* have this question before it. The sole question in that case was the scope of the "agriculture" exemption.

The administrative interpretations also clearly indicate that unless the worker is employed in the structure where the processing operation is carried on, he is not exempt. (See § 23[a] of Administrator's Interpretative Bulletin No. 14, quoted at p. 42, *infra*.)

See also *Walling, etc. v. Bridgeman-Russell Co.* (D. Minn. 1942), 2 W.H.C. 785, 790:

"4. The term 'place of employment' as used in Section 7(c) of the Act means those portions of an establishment devoted by the employer to 'first processing' operations. The Section 7(c) exemption is applicable to any employees who perform exclusively the operations described in this Section, and any employees who, though not engaged in 'first processing' operations, are engaged *exclusively* in occupations which are a necessary part thereof *and perform such duties in those portions of the premises devoted by the employer to 'first processing' operations.* * * *

"5. The applicability of the exemption provided by Section 7(c) is determined by the nature

of the duties performed by the employee during the work week. If, during any part of the work week, the employee performs duties which do not fall within the scope of the exemption, the exemption is not applicable. Consequently, the exemption is not applicable to persons employed as laboratory workers and firemen and engineers in the defendant's Duluth, Minnesota establishment during all the weeks covered by the complaint, * * *'' (Emphasis added.)

See also *Fleming v. Swift & Co.* (N.D., Ill. 1941), 41 Fed. Sup. 825, 831 (affirmed 131 Fed. (2d) 249):

"7. Sec. 7(c) of the Act does not exempt industries from the overtime provisions of the Act, but only the specific processes therein mentioned.

"8. The term 'place of employment' as used in sec. 7(c) of the Fair Labor Standards Act means those portions of the plant devoted by the employer to the handling, slaughtering, or dressing of livestock as those terms are construed herein. In addition to the employees specified in conclusion of law No. 6, any employee whose employment during any workweek is wholly within the place of employment, as herein defined, and who during that workweek is working exclusively in an occupation which is a necessary part of the handling, slaughtering or dressing of livestock, also comes within the exemption of sec. 7(c) of the Act."

C. What activities of the employee appellees are subject to the § 7(c) exemption during the processing season?

It is the appellees' contention that only those of the appellant's employees whose activities in a particular

workweek are *directly and exclusively* connected with the processing of the sugar cane are subject to the § 7(c) exemption. This group would include only those employees engaged in the washing, crushing, boiling, evaporating, centrifuging, and bagging operations, and then only as to those workweeks during which these were the sole activities of such employees. For the reasons heretofore set forth, the exemption would not apply to any of said employees who, in a particular workweek, engaged in repair and maintenance work during the 24-hour shutdown period between 2 P.M. Saturday and 2 P.M. Sunday when no raw sugar is produced.

Appellant on the other hand contends that the § 7(c) exemption applies not only to the activities described above, but also to those workers engaged in the following activities:

- (1) Production and storage of bagasse;
- (2) Removal of stones, trash, dirt, etc. from the mill;
- (3) Handling of bagged sugar after it leaves the mill;
- (4) Operation of the Fireroom;
- (5) Operation of the Electric Power Plant;
- (6) Operation of the Concrete Products Plant;
- (7) Operation of the Garage, Service Station and Stables;
- (8) Operation of the General Supplies Warehouse;

- (9) Operation of the Machine, Welding, Tinsmith, Blacksmith, Cane-loading Machine Repair, Tractor Repair, Electric, Paint, Plumbing, and Carpenter Shops;
- (10) Operation of the Laboratory.

Appellant also contends that all of its employees who are machinists, repair men, welders, blacksmiths, tinsmiths, garage mechanics, electricians, plumbers, carpenters, painters, and laboratory personnel are exempt under § 7(c) because part of their work is done on or in connection with cane processing facilities. This contention is advanced even in the face of the stipulation of facts (R. 129-256) which clearly points out that even during the processing season a large part of the time and efforts of all of these employees is spent on or in connection with transportation, housing, irrigation, cultivating, harvesting, and other non-processing facilities.

Appellant's contention is also advanced in the face of the fact (see Exhibit "F" attached to the complaint, R. 114) that all of these activities, with the exception of the fireroom and the electric power plant, have as their base of operations buildings and structures which are entirely separate and apart from the processing mill itself. The warehouse where the bagged raw sugar is stored, the general supplies warehouse, the roundhouse, the electric shop, the garage, the tinsmith shop, the blacksmith shop, the crane repair shop, the tractor repair shop, the carpenter shop, the machine shop, the welding repair shop, the electric

power station, and the chemistry laboratory are all located in separate buildings, and *all* of the employees attached thereto during all or part of most work-weeks engaged in activities which are not directly connected with the processing of cane or the machinery and equipment used therein. (See those sections of stipulation (R. 129-256) which describe these activities.)

The Administrative Interpretations.

The following extracts from Interpretative Bulletin No. 14 pertain to the processing exemption and will assist in a determination of the problem here involved:

“23(a) The determination as to whether all employees of the employer who are working in the establishment are included in the exemption or whether the exemption applies to only such employees as perform the operations described in the section must be made in the light of the legislative history of section 7(c). The congressional debates show that the purpose of this section was to relieve processors of seasonal agricultural commodities from the hour provisions of the act so as to enable them more easily to conduct their operations during peak seasons. It is our opinion, therefore, that only the employees who perform the operations described in section 7(c) *or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment*, are covered by the exemption. For example, in the ordinary case, none of the

employees in a department separate from the department in which the exempt operations are performed will be exempt. Thus, employees working in the meat-curing or sausage-making departments of a meat packing house will not be within the exemption.” (Emphasis added.)

And from Section 18:

“Operations performed on bagasse, such as removing same from the sugar mill, baling and compressing, are not included in the exemption, since such operations do not constitute the ‘*processing of * * * sugarcane*’ and further such operations do not result in sugar or syrup. The exemption, it should be noted, is limited to the processing of sugarcane ‘*into sugar * * * or into syrup.*’ ”

And from Section 16:

“The storing of cotton, either before or after compressing, is not, in our opinion, included in the term ‘ginning and compressing of cotton’. Support for this position is found in the fact that the word ‘storing’ was in the bill at one time in connection with an exemption from the hour provisions and was subsequently deleted (see also par. 23).”

The wording of Section 23 of Bulletin No. 14 quoted above was based on the decision of the Federal District Court for the Northern District of Illinois in *Fleming v. Swift & Co.*, 41 F. Supp. 825, affirmed in *Walling v. Swift & Co.*, 131 F. (2d) 249, cited above.

The cases.

The case of *Walling v. Bridgeman-Russell Co.* (D. Minn., 1942), 2 WHC 785, which involved the first processing of milk, etc., sets forth certain rules which that Court felt should be followed in determining the extent of the § 7(c) exemption. We quote from the conclusion of law in that case (p. 790):

“3. Section 7(c) does not exempt *industries* from the overtime provisions of the Act, but only *the specific processes* therein mentioned.

“4. The term ‘place of employment’ as used in Section 7(c) of the Act means those portions of an establishment devoted by the employer to ‘first processing’ operations. The Section 7(c) exemption is applicable to any employees who perform exclusively the operations described in this Section, and any employees who, though not engaged in ‘first processing’ operations, are engaged exclusively in occupations which are a necessary part thereof *and perform such duties in those portions of the premises devoted by the employer to ‘first processing’ operations * * **” (Emphasis added.)

“5. The applicability of the exemption provided by Section 7(c) is determined by the nature of the duties performed by the employee during the workweek. If, during any part of the workweek, the employee performs duties which do not fall within the scope of the exemption, the exemption is not applicable. * * *”

It is well settled that where an employee devotes part of his time during a particular week to an exempt

activity, and part of his time to a non-exempt activity, he does not come within the § 7(c) exemption.

Interpretative Bulletin No. 14, § 38;

Shain v. Armour, 50 F. Supp. 907;

Walling v. Bridgeman-Russell Co., *supra*.

From the foregoing, the conclusion seems inescapable (1) that employees engaged in handling bagasse produced at the mill and employees engaged in handling the raw sugar after it has been sacked are not exempt under § 7(c); (2) that none of the activities or operations heretofore listed at pages 40-41 are subject to the exemptions because such activities and operations do not relate *exclusively* to the *processing* of sugar cane. (R. 129-256.)

Appellant places considerable reliance on *Abram v. San Joaquin Cotton Oil Co.*, *supra*. In that case, however, the employer was engaged *solely* in the processing of cotton seed. The employer did not produce the cotton from which the seed came, did not separate the seed from the cotton, did not transport the seed to the employer's mill, nor transport the end-products from the mill to the purchasers thereof. While it is true that the Court held that the janitor and watchman at the plant, a truck driver hauling trash away from the plant, and workers unloading cottonseed as it arrived at the mill, were subject to the § 7(c) exemption, the situation involved in the *Abrams* case is clearly distinguishable from that obtaining in the case at bar. In that case the sole operation of the employer was the processing of cottonseed. On the other hand, in addition to process-

ing sugar cane, the employer in the case at bar produces the raw material, transports it to the mill, ships raw sugar to the mainland, participates through stock ownership in the refining operations, and maintains in Hawaii a company town where the workers and their families reside. Furthermore, all of the workers as to whom the appellant in this case seeks to secure the § 7(c) exemption, except those workers in the mill directly and exclusively engaged in the washing, crushing, boiling, evaporating, centrifuging, and bagging operations, devote a large portion of their time and effort to activities unrelated to processing. This was not true in the *Abrams* case.

McComb v. Hunt Foods, Inc. (CCA 9), 167 F. (2d) 905, recently decided by this Court, is also cited by appellant. We fail to see that this case is in any way determinative of the issues here presented. That case merely held that the production of apple juice and pomace from whole apples, apple peelings and cores, was a part of the "first processing" operation. We don't believe the language in the case concerning the weight and scope to be given to statutory exemptions generally, was intended to indicate a departure from the well-established rules regarding the strict construction of statutory exemptions. (*Fleming v. Hawk-eye Pearl Button Co.* (CCA 8), 113 F. (2d) 52; *Smith v. Townsend*, 148 U.S. 490, 37 L. Ed. 533.)

Congressional purpose, as expressed in the Act, plainly refutes the contention that activities which may be necessary to processing, as distinguished from processing activities per se, should likewise be held

exempt. Elsewhere in the Act, Congress demonstrated that, where it desired to cover both particular activities and other activities necessary thereto, appropriate language was employed. Thus, § 3(j) grants coverage to employees who produce goods for commerce, and also to employees whose activities are necessary to the production of goods for commerce. But in granting the sugar processing exemption to employers, Congress confined it to the time during which and the place where the processing operations per se were taking place. It would do violence to statutory purpose and language to exempt each and every employee, regardless of the nature of his work or the locale of its performance, merely because certain of his fellow employees were engaged in processing. On such a theory, the provisions of the Act designed to protect workers against abuse could be construed away into virtual ineffectiveness.

IV. APPELLANT CONTENTS THAT EACH OF ITS EMPLOYEES WHOSE WORK DURING A SUBSTANTIAL PORTION OF A WORK WEEK ENTITLES HIM TO EITHER THE AGRICULTURAL OR PROCESSING EXEMPTION, OR BOTH, IS EXEMPT FOR THE ENTIRE WORKWEEK EVEN THOUGH A SMALL PORTION OF THE WORKWEEK IS SPENT IN NON-EXEMPT WORK.

Section 2 of the Administrator's Bulletin No. 14 reads in part as follows:

“An employee is exempt by virtue of Section 13(a)(6) if, but only if, his work falls within the specific language of Section 3(f). If during any workweek an employee performs work some of

which is exempt under Section 3(f) and some of which is not exempt, the exemption does not apply to him during that workweek. It is our opinion, in other words, that there can be no segregation within a workweek between exempt and nonexempt operations.”

The Courts have sustained this interpretation, it being well settled that where an employee devotes part of his time during a particular workweek to exempt activities and part of his time to non-exempt activities, he loses the exemption for the entire workweek.

Shain v. Armour & Co. (W.D. Ky.), 50 F. Supp. 907;

Walling v. Bridgeman-Russell Co. (D. Minn., 1942), 2 WHC 785;

Walling v. De Soto Creamery & Produce Co. (D. Minn., 1943), 3 WHC 395, 397.

The cases cited by appellant in support of its contention in this regard are not at all inconsistent with the Administrator's interpretation quoted above.

V. APPELLANT'S FINAL CONTENTION IS THAT CERTAIN OF THE APPELLEES, WHEN ENGAGED IN REPAIRING AND MAINTAINING APPELLANT'S HOUSES AND RELATED DOMESTIC FACILITIES, ARE NOT "ENGAGED IN (INTERSTATE) COMMERCE OR IN THE PRODUCTION OF GOODS FOR (INTERSTATE) COMMERCE" AND THEREFORE THE PROVISIONS OF THE ACT DO NOT APPLY TO SAID EMPLOYEES. APPELLANT FURTHER CONTENDS THAT EVEN IF SAID EMPLOYEES ARE HELD TO BE SO ENGAGED, THEY ARE NEVERTHELESS EXEMPT FROM THE PROVISIONS OF THE ACT BY VIRTUE OF § 13(a)(6) AND § 7(c).

The employees here under consideration spend a considerable portion of their time repairing and painting company houses, cleaning plantation villages, constructing and repairing plumbing installations in the company houses, and in constructing and repairing the water and sewage systems servicing such houses. They are also engaged in trimming shade trees located around the plantation houses, cutting firewood for use as fuel in the plantation houses, and painting the company gymnasiums and club house. They will be referred to herein as "housing maintenance employees".

It is conceded that these employees, when engaged in the activities described above, are not directly "engaged in (interstate) commerce". However, it is unnecessary that they be so engaged. They are entitled to the Act's protection if they are "engaged * * * in the production of goods for (interstate) commerce" (§ 7[a]). Section 3(j) of the Act defines the word "produced" as follows:

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this

Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof*, in any State.” (Emphasis added.)

The first case cited by appellant in support of its contention with reference to these employees is *McLeod v. Threlkeld*, 319 U.S. 491. However, that case held only that a cook employed by the operators of a railroad commissary was not “engaged in commerce”. *Armour & Co. v. Wantock*, 323 U.S. 126, 131:

“*McLeod v. Threlkeld*, 319 U.S. 491 [2 WH Cases 75], which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged ‘in commerce’, and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.”

We likewise concede that the employees here under discussion are not “engaged in commerce” within the meaning of the Act, nor, as we have pointed out, need they be so engaged in order to receive the Act’s protection.

Appellant places great reliance on the case of *Wilson v. Reconstruction Finance Corporation* (C.C. A. 5), 158 Fed. (2d) 564. In that case the Dow Magnesium Corporation operated a large war plant

for the production of magnesium. The Defense Plant Corporation maintained approximately 2,000 dwelling houses adjacent to the magnesium plant for the purpose of housing employees of the magnesium plant and their families. The question before the Court was whether or not employees of the Reconstruction Finance Corporation acting as firemen at the housing project were subject to the Fair Labor Standards Act. The Court held that they were not engaged in the production of goods for commerce and, therefore, were not entitled to the benefits of the Act. The holding is not applicable to the case at bar because of the fact that in that case the employees involved were not employees of the operator of the magnesium plant. As the Court stated (p. 565):

“The independence of the employer of the plaintiffs and the employers of the housing occupants insulates the plaintiffs from the status of producers of goods for commerce.”

Appellant then cites the case of *Morris v. Beaumont Mfg. Co.* (W.D.S.C.), 12 Labor Cases, para. 63,687. In that case the operator of a large textile plant in the City of Spartanburg, South Carolina, owned a number of houses scattered throughout the city, which houses were rented primarily to the operator's employees. The question before the Court was whether those workers engaged exclusively in the construction, maintenance, and repair of these houses, were subject to the Act. The Court held they were not. The Court pointed out in the second paragraph of its opinion that “the defendant does not maintain

a mill village in the sense that term is commonly used", indicating that its decision would have been different if the Court was confronted with a "company town" which, as in the case at bar, originated and exists as a component part of the employer's business to insure a constant and stable supply of labor.

Appellant also cites *10 East 40th St. Building Corp. v. Callus*, 325 U.S. 578, which case involved the question of whether maintenance employees of the owner of a 48-story New York office building housing a number of companies engaged in interstate commerce were "engaged in the production of goods for commerce". While the Court held that these employees were not entitled to the coverage of the Act, the decision went off on the ground that the owner of the office building was not himself engaged in interstate commerce, or in the production of goods for commerce. In the case of *Borden Co. v. Borella*, 325 U.S. 680, which was handed down on the same date, the Court held that where the employer of the maintenance employees was himself engaged in interstate commerce, the maintenance employees were entitled to coverage of the Act. The *Borella* case plainly renders the *Callus* decision inapplicable to the case at bar.

The administrator has not taken a definite position on this question, so far as we know. See page 97 of 1944 W. H. Man. where the following question was asked of, and answer given by, the administrator:

"Question. Our company owns approximately 25 tenant houses which are rented to our em-

ployees. Is the labor used in connection with repairs and improvements of these tenant houses subject to the provisions of the Fair Labor Standards Act?

“Answer (Administrator). It is our opinion that maintenance employees whose activities directly contribute to the production of goods for interstate commerce are properly to be deemed engaged in ‘a process or occupation necessary to the production’ of such goods and for that reason within the Act’s general coverage. See in this connection Section 3(j) of the enclosed copy of the Act. However, we are not prepared at the present time to express any definite opinion regarding the applicability of the Act to employees engaged exclusively in the repair of homes in mill villages. Of course, if in any workweek any such employee in addition to performing work in the mill village performs other work which is covered by the Act, such as maintenance work in or about the actual plant, his employment would be deemed covered during all workweeks when any such covered work was performed.”

The Michigan Supreme Court, in the case of *Basik v. General Motors Corp.*, 5 W.H.C. 1061, and the Federal District Court of Indiana in *Ferguson v. The Prophet Co.*, 6 W.H.C. 284, held that employees engaged in preparing food at a plant cafeteria are engaged in the production of goods for commerce. If these decisions are sound, and we believe they are, then the principles on which they rest would clearly entitle the employees in our case to the Act’s protection.

In *McComb v. Factory Stores Co.* (N.D., Ohio), 8 W.H.C. 284, the Court held that employees of a concern operating canteens on premises of the Republic Steel Corporation were engaged in the "production of goods for commerce" and subject to the Act. At page 291 the Court stated: "It cannot be denied that in the final analysis, the canteens are a part of Republic's integrated system of efficient steel production." Here, too, the company town is a part of the appellant's integrated system of efficient sugar production.

The appellant also contends that if these housing maintenance employees are held to be engaged in the production of goods for commerce, they are then automatically exempt either under the § 13(a)(6) exemption or the § 7(c) exemption. This, of course, by no means follows, and appellant cites no authority to support its contention. It is quite clear under the authorities we have cited in our discussion of the § 13(a)(6) and § 7(c) exemptions that by no stretch of the imagination can these housing maintenance employees be held to be engaged in agriculture or in the processing of sugar cane.

Appellant concedes (R. 225-255) that during a particular workweek many of these housing maintenance employees will frequently be engaged part of the week in the maintenance and repair of company houses and facilities connected therewith, and part of the week in the maintenance and repair of sugar processing and field equipment. Obviously, when these employees are

engaged in the latter activities, they are engaged "in the production of goods for commerce". It is well settled that in such a situation the employee is entitled to the benefits of the statute during the entire workweek. See Interpretative Bulletin No. 5, which reads in part as follows:

"* * * In determining the applicability of the Act, the workweek is to be taken as the standard. Thus, if in any workweek an employee produces goods for commerce and also produces goods for local consumption or performs work otherwise outside the coverage of the Act, the employee is entitled to both the wage and hour benefits of the Act for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material. An employee spending any part of a workweek producing goods for commerce will be considered on exactly the same basis as an employee engaged exclusively in producing goods for commerce during the workweek and the total number of hours which the employee works during the workweek at both types of work must be compensated for in accordance with the minimum wage and maximum hour standards of the Act.

"* * * the burden of effecting segregation between workweeks and between different employees is upon the employer (see paragraph 5 of Interpretative Bulletin No. 1) and, as to any particular employee not accorded the benefits of the Act during any workweek it would be necessary, for example, to show that he did not prepare or handle materials used in the production of

goods for interstate commerce, nor clean machinery used in such production, nor aid in any way in the production of any goods for commerce
* * *”

CONCLUSION.

If the broad social purposes of the Fair Labor Standards Act are to be achieved, the following conclusions are inescapable:

(1) That none of the appellees, with the exception of those engaged directly and exclusively in the cultivation, growing, and harvesting of sugar cane, are excluded from the Act's protection under the § 13(a)(6) exemption.

(2) That only those appellees engaged directly and exclusively in the processing of sugar cane in the mill are subject to the § 7(c) exemption, and only as to those workweeks when they are exclusively so engaged.

(3) That all the appellees, including those engaged in the maintenance and repair of the company houses and facilities connected therewith, are engaged “in the production of goods for commerce”.

(4) That as to any workweeks in which any of the appellees perform any non-exempt work they are not exempt during such workweek from the provisions of the Act.

It is respectfully submitted that the decision of the trial Court, with the minor modifications herein requested, should be sustained.

Dated, San Francisco, California,
November 19, 1948.

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,
RICHARD GLADSTEIN,
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(Appendices Follow.)

Appendices.

Appendix A

“(1) *Unloading.*—On the typical plantation, long lines of small cars loaded with cane stand outside the mill. These move slowly into the factory where the cane is pushed onto the mill conveyor by mechanical rakes.

“(2) *Grinding and pressing.*—The milling plant is composed of a crusher, and four three-roller presses in tandem, through which the crushed cane is passed for further juice extraction. The top roller of these presses is under hydraulic pressure of 75 to 100 tons per foot of length. The grinding rate varies from 25 to 100 tons of cane per hour at a single tandem mill. A double tandem mill will grind up to 150 tons per hour. One plantation mill has a capacity of 150 tons per hour. The average for all mills, however, is 55 tons per hour.

“(3) *Clarification.*—The pressed juice must be heated and limed. It then goes to a settling tank or tray-type clarifier. The clear juice is drawn off and goes to evaporators. The muddy settlings are then piped to filters. The Oliver Campbell Filter, now generally used, appeared in 1927. It consists of a drum covered with extremely fine holes constantly revolving in the settlings. A vacuum inside the drum draws juice through the holes but leaves mud and extraneous material deposited outside where it is scraped off the revolving drum and is then used as fertilizer.

“(4) *Evaporation*.—Excess liquid is removed from the juice by simply boiling it in quadruple evaporators. Exhaust steam from the main mill engines provides the heat, and all boiling is under vacuum to increase the drying efficiency.

“(5) *Crystallization*.—After boiling the thick sirup flows into tanks where it is kept slowly moving by mechanical paddles until it crystallizes. Since all operations in the milling process are mechanical up to this point, relatively little labor is required beyond the necessary to check on the progress of the cane sirup through the various processes. Such laborers as are needed, however, must be highly trained technicians.

“(6) *Drying*.—As soon as the proper degree of crystallization has developed, drying (or ‘purging’) is accomplished by the use of rapidly revolving metal cylinders (or ‘centrifugals’). They are 30 to 40 inches in diameter and revolve at the rate of 900 to 1,400 revolutions per minute.

“(7) *Bagging*.—Automatic machinery drops the raw sugar into jute bags, weighs it, sews the bag, and delivers it to the conveyor.

“Much of the machinery, for example, steam pressure regulators, liming regulations, temperature regulators, juice level regulators, density indicators and the like, is automatic, requiring only occasional inspection and control.

“Electrification of the mills has proceeded rapidly. The use of new materials, such as stainless steel, has also aided efficiency.”

Appendix B

“At the time the plaintiff company was organized, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane, to accommodate the employees whom the plaintiff needed for its operations. As a consequence, it became necessary for the plaintiff to construct houses, develop services and otherwise build up and establish facilities for permanent living on the plantation to serve the needs of the required number of employees and their families. The plaintiff did this over a period of years and established a perquisite system under which employees received housing, housing maintenance, water, fire wood and kerosene fuel, electricity, medical care, recreational facilities and various maintenance services, including garbage disposal and street cleaning, as a part of their regular compensation. The principal plantation community was established around the plantation buildings and yard area as shown on Exhibit ‘A’ and came to be known as the Village of Waialua * * *.”

* * * * *

“At the present time the plaintiff owns 820 houses, all of which are located on the plantation. Most of them surround the plantation buildings and yard area and together with the business establishments of the community constitute the village of Waialua. Approximately 335 houses, however, are scattered over the plantation, some of this latter number being clus-

tered and forming field villages * * * On the basis of a census which was completed June 30, 1946, the 820 houses on the plantation were occupied by 3,373 persons, 2,952 of whom were employees and pensioners of the plaintiff, and their families. * * *

* * * * *

“Waialua village has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and also roads constructed and maintained by the plaintiff. This plantation community offers the usual services and typical commercial establishments to be found in any small town or village. It has ten (10) general stores, two (2) restaurants, two (2) fish markets, one (1) candy store, one (1) hardware store, one (1) clothing store, four (4) barber shops, one (1) beauty shop, one (1) photographic studio, two (2) automotive stations, two (2) motion picture theatres, one (1) bank, and other service establishments, all of which are independently owned and operated; a retail store with two (2) branches, an automotive service station and a hospital owned and operated by the plaintiff for both its employees and their families and non-plantation persons; and one (1) post office, one (1) public library, five (5) churches, one (1) intermediate and one (1) high school and one (1) day-care center operated as a part of the Territorial School System * * *”

At page 71 of Bulletin No. 687, we find the following quotation:

“It must be remembered that the whole plantation area, including the town, is owned by the plantation company, and although there are frequently many shops, such as drugstores, tailor shops, shoemakers, and the like, that are privately operated, they rent their sites from the plantation and can remain only as long as the plantation permits them to do so. Anyone on any part of the plantation is a trespasser unless he has the permission of the management to be there * * *”

Appendix C

“An understanding of the structural organization of the Hawaiian sugar industry begins with the agency system * * *

“The present agency system grew out of the trading concerns of the nineteenth century. These ‘factors’, as they are still called in Hawaii, dealt with whalers and trading ships, providing them with supplies and often acting as middlemen in the sale of such commodities as were then brought to Hawaii. During the latter half of the nineteenth century, the collapse of the whaling industry, combined with a sharp decline in Hawaiian exports to California, diverted the capital of the factors to the plantations. As late as 1860 Hawaiian planters generally arranged for transporting and selling their sugar through captains of trading ships. But the rapid expansion of the sugar industry after the adoption of the reciprocal trade agreement with the United States in 1876 made the commercial functions of the plantations so important and pressing that the factors were encouraged to concentrate upon them. The extreme isolation of Hawaii and the difficulties of maintaining contacts between the plantation management and the distant markets of the American mainland also tended in this direction. In time, five factors came to handle practically everything the plantations bought or sold.

“Gradually they also took over the financing of the industry, in fact, the mobilization and control of cap-

ital for the sugar industry has become their major function.

“Under the existing conditions, this appeared to be a normal development. Plantation agriculture is designed for the most effective production of sugar within the limitations which the land, labor, and capital of Hawaii impose, but it is not organized to meet the problem of merchandising with the wide orientation relative to world markets which that implies.

“A plantation involves a large outlay of capital, including long-term investment in buildings, equipment, and labor, as well as a considerable risk of crop and market fluctuations. Yet the individual planter seldom possessed either the business acumen to handle these matters or the capital to carry him through difficult times. By putting his purchasing, market, and financing problems into the hands of a concern specializing in these fields, the planter could focus upon his primary problem, that of maximizing production.

“The long-run result of this policy, however, was to deprive the plantation of its independence and to develop a highly integrated system which centered authority in the factors. The simple, independent plantation under an owner-manager persisted until 1880. About this time, under the guidance of the factors, there was a marked movement toward incorporation in order to provide a better mobilization of capital and a larger scale of production. By 1900, virtually all of the capital in the Hawaiian sugar industry was in corporate plantations. This period also

witnessed a sharp rise in the authority of the factors, together with a trend toward consolidation on the part of both factors and plantations. (Emphasis added.)

“In the period of financial stringency of the early nineties, the weaker plantations were faced with a choice of going into bankruptcy or yielding control to the factor to which they were indebted. Subsequent depressions accelerated this process. The factors were quick to take advantage of the reduction in costs which could be obtained by combining adjacent plantations into larger units. In 1883 there were 90 plantations which produced 57,053 tons of sugar. *In 1938 there were only 38 plantations but they produced 941,293 tons of sugar.* Meanwhile, the number of factors diminished to 5 * * * (Emphasis added.)

* * * * *

“The individual owner-managed plantation of the early eighties has thus been displaced by a corporate mass-production plantation controlled by one or another of the central agencies in Honolulu. It is managed by a trained agricultural executive with a staff of technical experts, all hired and directed by the controlling agency.”

Appendix D

“Another factor in our decision is the inclusion in Section 3(f) of commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, 46 Stat. 1550, 12 U.S.C.A. § 1141j(g). The said Section 15(g) provides that the term ‘agricultural commodity’ includes crude gum from a living tree, and certain specified products as processed by the original producer of the crude gum, such as turpentine and resin. It seems apparent to us that the inclusion of the Section 15(g) in Section 3(f) of the Act here in question is recognition of the fact that such operations as the production of turpentine from oleoresin, or of raw sugar from sugar cane, would not be included in the definition of agriculture unless specifically included. There is no specific inclusion for the processing of sugar cane into sugar in Section 3(f) as there is in Section 7(c). It is apparent from the specific inclusion of this processing in Section 7(c) that Congress was cognizant of it and included it in certain exemptions where it was thought desirable.

* * * * *

“Furthermore, it would seem that the employees involved in this case would not fall within the reason for the exemption which was accorded to agricultural employees. The Act was drawn not to include the latter because agricultural labor was not subject to the usual evils of sweat-shop conditions of long hours indoors at low wages. Also any attempt to regulate agricul-

tural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation. *Fleming v. Hawkeye Pearl Button Co.*, supra; cf. *North Whittier Heights Citrus Ass'n. v. National Labor Relations Board*, 9 Cir., 1940, 109 F. (2d) 76, 80, 81. For these reasons we reject the appellants' contention that the employees here involved are engaged in agriculture within the meaning of Section 13(a)(6) and Section 3(f).

* * * * *

"It is our conclusion that Section 6 of the Fair Labor Standards Act applies to the employees here in question and that they are entitled to the minimum wages provided in the statute. Among the appellants' employees only those engaged in planting, cultivating and harvesting of the sugar cane are exempt."

No. 11952

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

I.

ALL OF THE EMPLOYEE APPELLEES ARE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND THEREFORE ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13(a)(6).

The first issue before this court is whether the employees of this appellant are employed in "agriculture" as that term is defined in Sec. 3(f) of the Act. To be exempt an employee must simply be employed in one or another of the

activities or practices referred to in the statutory definition (Appellant's Br., pp. 15-17). By emphasizing extraneous issues,¹ appellees' brief (pp. 7-16) shows persistent unwillingness to rest the case upon facts which the statutory definition of "agriculture" makes relevant.

A. Size, mechanization and integration of appellant's operations are immaterial to the issue here.

Farms as large as appellant's are not rare in the United States, and mechanization of agriculture is commonplace (Appellant's Br., p. 17). Even appellant's plowing, weeding, irrigating and harvesting operations—all admittedly within the agricultural exemption—are mechanized. And throughout American agriculture, growing operations are commonly integrated with processing operations. See Brief for American Farm Bureau Federation, *amicus curiae* herein, pp. 2-3, 6-8. American farmers and farms commonly engage in the following activities, all of which are performed by the appellant: (1) hauling of the farm's produce to a storage place or a processing plant located either on or off the farm or to any market; (2) hauling of fertilizer, seed, other agricultural supplies and agricultural equipment from one part of the farm to another; (3) hauling of necessary farm supplies and equipment from a nearby town to the farm; (4) maintenance, repair and operation of trucks and other hauling facilities used by the farmer, including maintenance of field roads on the farm; (5) repair and overhauling of farm machinery, equipment and implements; (6) feeding and shoeing horses and mules; (7) maintenance and repair of farm buildings and grounds,

¹ Bulletin 687, Department of Labor, extensively relied upon by appellees, was issued in 1939. It is obvious however that in a declaratory judgment action like this one, where the relevant facts are those presently in existence, a bulletin issued in 1939, even if otherwise relevant, would be entitled to no weight. Bulletin 687 has been superseded by Bulletin 926, published in 1947, copies of which have been supplied this court. Nothing in either Bulletin may be relied upon to modify the stipulated facts on which this declaratory judgment action was submitted. According to the Stipulation which was filed with the court below on September 12, 1947, the facts and figures therein "represent a substantially true and accurate description of such activities and operations at the present time . . ." (R. 224).

and tools and implements used in the farm operations; and (8) processing of agricultural products grown on the farm preparatory to marketing. *Id.*, pp. 2-3, 6-8.

The processing by a farmer of the sugar cane he grows is, and has always been, a normal incident of sugar cane farming in Hawaii (R. 131, 184, 325-327).² In view of the highly perishable nature of sugar cane, which requires that it be processed into sugar, syrup or molasses within a few hours after being harvested and therefore within a few miles of where it is grown (R. 133), the processing, when done by the farmer who grows the cane, is nothing more than the preparation of the sugar cane for market. Sugar cane never moves into interstate commerce as such nor does it have any economic use except for processing into raw sugar (R. 133). Such processing can hardly be likened (Appellees' Br. p. 19) to the erection by the farmer of a shirt factory on his cotton farm and the claim of exemption for the shirt manufacturing. The weaving of the cotton into textiles and the manufacture of shirts from the textiles would obviously not be necessary or related to the marketing of the cotton grown on the farm.

B. Existence of the "factor" system in Hawaii, membership in Hawaiian Sugar Planters' Association, and part ownership of a sugar refinery are likewise immaterial.

Nothing in the statutory definition suggests that any consideration is to be given to the other issues sought to be injected by appellees. The existence of the "factor" system, the appellant's membership in Hawaiian Sugar Planters' Association and the appellant's alleged part ownership of a sugar refinery in California are irrelevant factors. This case in no way involves employees of any of the "factors" or of Hawaiian Sugar Planters' Association.

² The size and integration of Hawaiian sugar plantation operations resulted from natural factors and economic considerations. *Bulletin 926*, Department of Labor, p. 33. Such operations have resulted in high per-worker productivity, and largely determine the standard of living in Hawaii. *Id.* Hawaiian plantation labor is probably the highest paid agricultural labor throughout the world.

C. The Appellant is a "farmer" and operates a "farm" as those words are used in the statutory definition of "agriculture".

1. Appellees' brief (pp. 10, 13, 16, 18, 21, 22) repeatedly argues that appellant is not a "farmer" and that it does not operate a "farm". But a "farmer", as that word is used in Sec. 3(f), is one who engages in the operations enumerated in that section, including the growing of agricultural commodities. In other words the grower is necessarily a farmer. And a "farm", as used in Sec. 3(f), must mean the land or other place, under the ownership or control of the grower, where the growing operation takes place. The appellant thus is a farmer and operates a farm, for the undisputed facts show that all the lands in the case devoted to the growing of sugar cane are managed and operated by the appellant as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. (R. 135-136, 413.) Moreover, the appellant's farm has been about the same size since 1910 (R. 133).

As the Second Circuit said in *Damutz v. Pinchbeck*, 158 F. (2d) 882, 883, the test of whether an activity is exempt as "agriculture" under the Act is whether it comes under the statutory definition of agriculture contained in Sec. 3(f), and such statutory definition embraces "much more than what might be called ordinary farming activity" (Appellant's Br., p. 16).³ Appellant's operations, moreover, are not unusual in American agriculture. *Supra*, pp. 2-3.

2. Appellees assert (Br. p. 21) that in Interpretative Bulletin No. 14, dealing with the agricultural exemption, the Administrator was discussing "farmers" and "farms" as those terms are known in the *continental* United States; that he did not have in mind the huge, highly mechanized

³ "Employment in agriculture is probably the most far-reaching" exemption in the Act. *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 612. This statement of the Supreme Court refutes appellees' contention (Br. p. 32) that the fishing industry exemption in Section 13(a)(5) is much broader than the "agriculture" exemption and therefore that the case of *McComb v. Consolidated Fisheries Co.*, 75 F. Supp. 798 (D. Del. 1948) discussed in appellant's main brief, p. 42, does not support appellant's claim of the agricultural exemption for all its operations.

and integrated operations in the Territory of Hawaii. There is nothing in the Bulletin to indicate that the Administrator was using the terms "farmer" and "farm" in any sense except that compelled by the statute. Nowhere does the Administrator distinguish between small farm operations and large, highly mechanized and integrated operations. The Administrator did not exclude the Territories from the operation of Bulletin No. 14. Section 3(c) of the Act defines the term "State" to include "any Territory," and there is nothing in Sections 13(a)(6) and 3(f) which gives those sections different meaning as applied to Hawaii from that as applied to continental United States. Nor has the Administrator attempted to give them any different meaning. This is apparent from paragraph 2 of the Administrator's Interpretative Bulletin No. 2, issued October 17, 1938, which states:

"Therefore, employees within the District of Columbia, and the Territories and possessions (Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands), are dealt with on the same basis as employees working in any of the forty-eight states."⁴

D. The appellant's mill operations are "incident to" its field operations even though appellant's end product is raw sugar. In any event appellant's mill operations are "in conjunction with" its field operations and are for that reason alone exempt under the definition of "agriculture".

Appellees assert that the sole and only purpose of the industry is the production of raw sugar and ultimately refined sugar; that the growing of cane is subordinated to, and is synchronized with, the needs and capacities of the mill, instead of the other way around (Br., p. 10).

Where a series of operations are necessary to achieve the end result of raw sugar, the processing operation is not

⁴ The same paragraph appears without change as Section 776.1(c) of the Administrator's "General Statement on Coverage of Fair Labor Standards Act," published in the Federal Register of July 11, 1947 (12 F. R. 4583-4586). See Title 29, Code of Federal Regulations, Chapter V, Part 776; 3 C. C. H. Labor Law Reporter (4th ed.) ¶ 24,102.01.

shown to be paramount merely because it is the final step, and all the preceding operations, i.e., the hauling of supplies to the cane fields, the planting, cultivating and harvesting of sugar cane, the transportation of cane to the mill, etc., shown to be subordinate features merely because they are the prior steps. In terms of effort as represented by hours of labor and in terms of expense as represented by operating charges, appellant's mill operations are clearly subordinate to its cultivating, irrigation, harvesting, cane transportation and other general field operations. (Appellant's Br. pp. 26-28). Such mill operations thus satisfy the subordinacy tests laid down by the Administrator. 1944-45 *W H Man.*, pp. 592-593.

But even assuming *arguendo* that appellant's field operations are subordinate to the mill operation, appellees' argument still proves nothing. The statutory definition not only embraces "practices . . . *incident to* . . . farming operations" but, as a separate and distinct category of exempt operations, it also embraces "practices . . . performed by a farmer or on a farm . . . *in conjunction with* . . . farming operations" [Emphasis supplied]. The phrase "in conjunction with", unlike "incident to", has no connotation of subordinacy (Appellant's Br. p. 28). The mill operation is "in conjunction with" the field operations of appellant and as such is within the statutory exemption.

E. The legislative history of Sections 13(a)(6) and 3(f) shows that all employees of appellant here involved fall within the "agriculture" exemption.

1. Nothing in the legislative debates supports appellees' contention that when the Senators spoke of sugar cane processing, they referred only to the sugar cane processing that takes place in the southern states of the United States. The debates on this matter, which are set forth extensively at pages 81-83 of appellant's brief, show clearly that the Senators were not limiting their discussions to any geographical area.

2. Appellees concede (Br. p. 18), citing Senator Black, that where a small farmer both grows and processes cane he is exempt in both his growing and processing operations.

Yet under such circumstances there would be integration of the growing and processing operations—the very situation here involved. The added fact that appellant's operations are large and mechanized is immaterial. *Supra*, pp. 2-3.

The legislative history shows that the agricultural exemption is not confined to small non-integrated and non-industrialized operations. Bottling milk, packing apples, ginning cotton and slaughtering and preparing hogs for market—all highly industrialized operations—were intended to be exempt if such operations were performed by a farmer upon his own produce (Appellant's Br. pp. 34-35). Indeed these highly industrialized operations were considered exempt under a definition of "agriculture" which was later broadened considerably by a succession of amendments to include exemption for (a) practices performed "on a farm" as an incident to farming operations; (b) preparation for market; (c) delivery to market; (d) delivery to storage; (e) delivery to carriers for transportation to market; and (f) practices performed "in conjunction with" farming operations. Since such operations were deemed exempt under a narrower definition of agriculture than now appears in the Act, *a fortiori* they are exempt under the much broader definition that was ultimately adopted.

3. Appellant's main brief (pp. 40, 93) quotes statements made by appellee union to two legislative Committees of Congress to the effect that the bulk of the 28,000 workers engaged in the production and processing of sugar cane in Hawaii are not covered by the Fair Labor Standards Act; that 18,000 of such workers are field workers "of course, not covered"; and that the remaining 10,000 work in the mills and are excluded by Section 7(c) from the overtime provisions of the Act for 10 months of the year. These are statements by the appellee union, and not, as appellees now contend (Br. p. 19), expressions of the law "as presently interpreted by the employers". These statements were made for the purpose of enlisting Congressional action on legislation substantially narrowing if not eliminating the agricultural exemption. Congress declined to pass that legislation (Appellant's Br., p. 40). Appellees

now seek to obtain from this court an interpretation contrary to that urged on Congress by appellee union itself.

F. The "agriculture" exemption in Section 13(a)(6) and the processing exemption in Section 7(c) overlap in many significant respects.

On page 20 of their brief appellees contend that "the most conclusive evidence that Congress did not intend the 'agriculture' exemption to extend to the processing of raw sugar is the fact that it expressly exempted such processing from the overtime provisions of the Act (but not the minimum wage provisions thereof) in Section 7(c)." We have already shown the important respects in which the agricultural and processing exemptions overlap (Appellant's Br. pp. 31-33). The Administrator has time and again recognized such overlapping. Compare paragraph 10(b) of his Interpretative Bulletin No. 14 with paragraphs 15-21 of that Bulletin. The Administrator's lawyers have likewise held:

"We are definitely of the opinion that under proper circumstances the Section 13(a)(6) exemption may apply to the slaughtering, packing and shipping of pigeons. It is true that Section 7(c) provides a specific 14-workweek exemption for 'handling, slaughtering, or dressing poultry or livestock'. But Section 7(c) also provides a similar 14-workweek exemption for canning or packing perishable or seasonal fresh fruits or vegetables; and it will be noted from paragraph 10(b) of Bulletin No. 14 that canning and packing of fresh fruits and vegetables may under proper circumstances be exempt under Section 13(a)(6)". *1944-45 W H Man.*, p. 595.

G. The cases and administrative interpretations particularly sustain the "agriculture" exemption for appellant's employees engaged in hauling cane from the fields to the mill.

1. Interpretative Bulletin No. 14 clearly rules that hauling of the mill operator's own cane to his mill constitutes "agriculture" (Quoted in Appellant's Br. p. 47). Appellees argue (Br. p. 21) that this is contrary to the decision of the Court of Appeals for the First Circuit in *Vives v.*

Serralles, 145 F. (2d) 552. But in discussing the *Vives* case, appellees (Br. p. 28) state categorically that the court held that the "workers on the farm on which the mill was operated engaged in hauling the cane direct to the mill, were exempt . . . under Section 13(a)(6)." This inconsistency is nowhere explained. Since by the appellees' own admission, the *Vives* case did hold that transportation of the mill operator's own cane to his mill constitutes "agriculture", such decision fully supports the Administrator's statement in Interpretative Bulletin No. 14 and shows that the cane transportation operations in the case at bar likewise fall within the definition of "agriculture".

2. Appellees' discussion of the *Vives* case is replete with misstatements and untenable inferences. Appellees state (Br. p. 28) that in the *Vives* case the cane on outlying farms was hauled "by the harvesters thereof" to the "concentration points." If by the term "harvesters" the appellees mean the employees who sever the cane from the ground, a reading of the decision will show that such employees were not the employees who hauled the cane. The court listed the activities of the plaintiffs as follows:

" . . . they were engaged in the following types of work: laying portable tracks and moving them from one field to another; loading steel cars, portable track cars, or ox-carts in the field; picking up cane dumped by ox-carts and loading railroad cars at the sidings; handling winches, derricks or cranes at the loading points; and tractor operators, portable track car drivers, and ox-cart drivers."

It then held that the cane transportation operations of the plaintiffs were part of "harvesting" as that term is used in the statutory definition of "agriculture." Obviously then the plaintiffs were "harvesters" only in the sense that they transported cane from the fields to the mill.

Appellees assert (Br. p. 31) that since the instant case does not present the precise "concentration point" system which prevailed in the *Vives* case, then "transportation" (as distinguished from "harvesting") begins in this case at the time the cane is placed in the railroad cars in the fields. This is a *non sequitur*. The absence of concentra-

tion points makes the case here similar to that of the employees in the *Vives* case who hauled cane directly to the mill, and such employees were held by the court to be engaged in a "harvesting" operation.

In a vain attempt to distinguish the *Vives* case, appellees assert (Br. p. 32):

"Nor can we lose sight of the further distinguishing features heretofore discussed, such as appellant's *sugar refining activities*" [Emphasis supplied].

Such statement disregards the stipulated fact that the appellant "does not engage in any sugar refining operation" (R. 132).

H. The appellant's office and maintenance workers are exempt entirely under Section 13(a)(6) or partly under Section 13(a)(6) and partly under Section 7(c). In either event they are exempt from the overtime provisions of the Act.

Appellees (Br. pp. 22-23) dispute that the office and maintenance workers in the case at bar are exempt under the "agriculture" exemption, because much of the time and effort of such workers is related to activities having nothing to do with sugar cane production. To this we make two replies. First, in our main brief (pp. 22 *et seq.*) we have shown that all of the activities of appellant are exempt under the "agriculture" exemption. Hence whether the work of the maintenance and office employees relates solely to cane production or partly to some other aspect of the appellant's total plantation operations, such employees are exempt. Second, if some of appellant's activities are not exempt under Section 13(a)(6), they are exempt under Section 7(c) (Appellant's Br. p. 51 *et seq.*). Consequently the office and maintenance employees, at worst, are partly engaged in work related to cane production and partly in work related to cane processing. The former work is exempt under Section 13(a)(6); the latter under Section 7(c). As the court below held, an employee engaging in activities, some of which are exempt under Section 13(a)(6) and the remainder of which are exempt under Section 7(c), is exempt (R. 433, 445). Neither party has appealed from such holding and it is obviously correct.

II.

EMPLOYEE APPELLEES, WHO ARE ENGAGED IN THE HAULING OF SUGAR CANE FROM THE FIELDS TO THE MILL, THE PROCESSING OF SUGAR CANE INTO RAW SUGAR, AND THEIR INCIDENTAL AND FUNCTIONALLY NECESSARY AND INDISPENSABLE OPERATIONS, ARE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SECTION 7(c).

A. The exemption applies during the off-season.

1. Appellees (Br. pp. 35-36) have misconceived our argument. We contend that in order for the Section 7(c) exemption to apply two facts must be shown: (i) The employee must be employed in an activity which is directly and intimately connected with sugar cane processing; and (ii) The employee must work in the "place of employment" where the sugar cane processing activity takes place. We have shown that the off-season work is necessary repair and reconditioning work on the processing machinery and equipment required to permit the mill to continue operating (Appellant's Br. pp. 65-66), and that it occurs in the "place of employment" where the employer is engaged in processing sugar cane. *Id.*, pp. 54, 66. Accordingly, the processing exemption applies to the "off-season" work. Unlike shoe manufacturing in the hypothetical example offered by appellees, the repair work here involved is directly connected with and an integral part of sugar cane processing.

2. It is irrelevant to the issue here that pursuant to a collective bargaining agreement (Appellees' Br. p. 36), appellant is paying overtime compensation to its employees for work in excess of 40 hours per week during the off-season. It should first be stated that the only employees of appellant (other than a few who are on a 40 hour week throughout the year) who receive such overtime compensation during the off-season are employees in the mill and allied service shops (R. 137). Moreover, what appellant may agree to in collective bargaining has no relation to the requirements of the Fair Labor Standards Act as found

by this Court. *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 447, 463. It is common knowledge that an employer, for purposes of effecting a collective bargaining agreement with his employees, will agree to higher wage and hour standards than are required by law.

Nor is the question moot with respect to those employees to whom appellant voluntarily makes payment of such overtime compensation during the off-season. It is specifically stipulated (R. 137) that appellant contends, contrary to the contention of the appellees, that the provisions of the Fair Labor Standards Act do not require it to pay any of its employees overtime compensation. A declaratory judgment suit will lie to resolve this controversy. *Sunshine Mining Co. v. Carver*, 34 F. Supp. 274 (D. Idaho 1940).

B. The exemption applies to the activity of hauling sugar cane from the fields to the mill.

1. Appellees argue (Br. pp. 37-38) that in *Calaf v. Gonzales*, 127 F. (2d) 934 (C. C. A. 1), the lower court held that neither the "processing" nor the "agriculture" exemptions applied to the transportation employees; and that the correctness of the District Court's decision that these employees were not subject to the "processing" exemption was not attacked on the appeal nor even discussed by the Circuit Court.

The assertion that the District Court passed upon the "processing" exemption is unwarranted. The District Court wrote no opinion in the *Calaf* case but on August 23, 1941, entered Findings of Fact and Conclusions of Law together with a Judgment. We have examined all the papers in this case in the files of the U. S. Department of Labor. There is not a word in the Findings and Conclusions about the Section 7(c) processing exemption. Nor is there anything in the pleadings or in the briefs of the parties to indicate that that exemption was in issue in the case. In fact, all indications are that the parties and the court assumed that the Sec. 7(c) exemption did apply, for the employees worked over 40 hours during a week, did not receive any overtime compensation, and neither sought nor were

allowed any overtime recovery. And in the Circuit Court the transportation of sugar cane in the circumstances of the case was held to be "incident to milling", thus indicating that such transportation is part of processing and therefore entitled to the same exemption as any other part of the processing operation (Appellant's Br., pp. 46 (footnote 32), 57.)

2. Appellees assert (Br. p. 38) that the Administrator's interpretations foreclose any exemption under Sec. 7(c) unless the worker is employed in the structure where the processing operation is carried on. The Administrator's interpretations show the contrary (Appellant's Br. pp. 60-63, 90-92.) Such interpretations show that the Administrator regards the Section 7(c) exemption as applicable to employees transporting raw materials to the processing establishment and finished products away from it. In fact, he regards the exemption as applicable to work in a warehouse located in an adjoining county.

C. If a plant engages exclusively in an operation described in Sec. 7(c), such as the processing of sugar cane, the exemption applies to all employees of that plant including those engaged in activities that are functionally necessary and indispensable to the described operation.

1. Appellees (Br. pp. 39, 44) cite authorities⁵ to the effect that Section 7(c) does not exempt industries from the overtime provisions of the Act but only the specific processes therein mentioned.

But these holdings were made with respect to plants that were engaged both in operations which the exemption language of Section 7(c) describes and in other operations which such exemption language does not describe. In the *Swift* case, the employer not only was handling, slaughtering and dressing livestock—the only operations on livestock exempted by Section 7(c)—but also was performing other operations that Section 7(c) does not exempt. And in the *Bridgeman-Russell* case, the employer was not only

⁵ *Fleming v. Swift*, 41 F. Supp. 825, 831 (N. D. Ill. 1941) and *Walling v. Bridgeman-Russell Co.*, (D. Minn. 1942) 6 Labor Cases ¶ 61,422.

engaged in the first processing of milk, whey, skimmed milk and cream into dairy products, but was also performing other operations that Section 7(c) does not exempt. Here, however, aside from the growing of cane, the appellant is engaged exclusively in an operation which Section 7(c) exempts, to wit the processing of sugar cane into raw sugar and molasses. As shown by the cases discussed in our main brief (pp. 57-59 and footnote 41 on p. 59), where the courts have had before them a plant engaged exclusively in an operation which Section 7(c) exempts, they have uniformly held exempt all activities which are functionally necessary and indispensable to such exempt operation. The Administrator is likewise of this view. *Id.*, pp. 89, 90.

2. Appellees (Br. pp. 45-46) question appellant's reliance upon *Abram v. San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif. 1943). They assert that the *Abram* case is distinguishable because there the employer's sole operation was processing cotton seed, while here the appellant, besides processing sugar cane, produces the raw material, transports it to the mill, ships raw sugar, participates in the refining operation and maintains in Hawaii a "company town" where the workers and their families reside. But all of these other activities in which appellant engages are either (i) component parts of its activity of growing sugar cane and therefore exempt under Section 13(a)(6), or (ii) necessary and indispensable elements of its processing operation and therefore exempt under Section 7(c), or (iii) with respect to the dwelling house maintenance work, not covered by the Act at all because not constituting an engagement in commerce or in the production of goods for commerce. Appellees do not show to the contrary.

3. In setting forth the Administrator's interpretations of Section 7(c) on pages 42-43 of their brief, appellees fail to make any reference to (a) paragraph 22 of Interpretative Bulletin No. 14, set forth in relevant part in the appellant's brief, p. 89, or (b) the Administrator's press release of January, 1943, discussed at length on pages 61 and 90-91 of appellant's brief. These interpretations show that the Administrator regards the Section 7(c) exemption as applicable to employees transporting raw materials to the

processing plant and finished products away from it, and also to all other employees engaged in activities functionally necessary and indispensable to the processing operation. In accord is the opinion of the Administrator's attorneys that employees of a sugar mill engaged in transporting raw sugar from the mill to the employer's warehouse located 7 miles away are within the Section 7(c) exemption. *1944-45 WHMan.* p. 609. See also the Administrator's interpretation *id.*, pp. 603-604.⁶

D. Any employee appellee, who in a workweek performs some work which is exempt under Section 13(a)(6), other work exempt under Section 7(c), and other work which is not within the coverage of the Act at all, is exempt during such workweek from the overtime provisions of the Act.

Appellees (Br. pp. 40-41) list a number of activities and assert that appellant contends the Section 7(c) exemption is applicable to workers engaged in such activities. They assert that this contention is unsound because such activities do not relate exclusively to the processing of sugar cane. *Id.* p. 45. Again, appellees contend that the Section 7(c) exemption does not apply to employees such as machinists, welders, etc., because their work is not confined exclusively to the cane processing facilities but is also performed in connection with transportation, housing, irrigation, cultivating, harvesting and other non-processing facilities. *Id.*, pp. 41, 42, 46.

Appellees have misstated appellant's contention and have ignored the following two principles of law:

- (a) Any employee engaged during any workweek in activities, some of which are exempt under Section 13(a)(6) and the remainder of which are exempt under Section 7(c), is exempt from overtime requirements for that workweek.

⁶ Appellees (Br. pp. 43, 45) also rely upon paragraph 18 of the Administrator's Interpretative Bulletin No. 14 which provides that removing bagasse from the mill and baling and compressing same are not exempt operations under Section 7(c). But these are extraneous facts, since bagasse is not removed from the appellant's mill nor is it baled and compressed (Appellant's Br. p. 63).

- (b) Any employee, who in any workweek performs some work that does not constitute commerce or the production of goods for commerce and other work which is exempt under either Section 13(a)(6) or Section 7(c), is exempt from overtime requirements for that workweek.

These propositions are patently sound because certainly in order to fix an obligation upon an employer to pay overtime under the Act, it must be shown that at least some of an employee's work (i) constitutes commerce or the production of goods for commerce, *and* (ii) does not come within any exemption from the overtime provisions of the Act. This is the view taken by the court below, by other courts and by the Administrator (Appellant's Br. pp. 79-80).

The activities listed by the appellees in part relate to sugar cane growing, in part to sugar cane processing and in part to housing maintenance. We submit: First, all of these activities are within the agricultural exemption. Second, if all these activities are not within the agricultural exemption, then to the extent to which they are connected with sugar cane growing, they are exempt under the agricultural exemption; to the extent to which they are connected with sugar cane processing, they are exempt from overtime requirements under Section 7(c); and to the extent to which they relate to dwelling house maintenance they are not covered by the Act at all. Thus even if an employee devotes part of his time in any workweek to work that is not on the cane processing facilities, he is nonetheless exempt from the overtime provisions of the Act for that workweek because his other work is exempt under Section 13(a)(6) or is not covered by the Act at all.

III.

THE EMPLOYEE APPELLEES, WHEN REPAIRING AND MAINTAINING APPELLANT'S HOUSES AND RELATED DOMESTIC FACILITIES, ARE NOT "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE"; BUT EVEN IF THEY ARE SO ENGAGED, THEY ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SECTION 13(a)(6) AND SECTION 7(c).

A. The village maintenance employees are not "engaged in [interstate] commerce or in the production of goods for [interstate] commerce."

Appellees (Br. p. 52), arguing that the housing maintenance employees are subject to the coverage provisions of the Act, rely upon *Borden v. Borella*, 325 U. S. 680. In that case the Act was held to apply to maintenance workers in the office building of a manufacturing corporation from which a nationwide "industrial empire" was supervised, managed and controlled. Such management and control of the physical production process, plus accompanying clerical and accounting activities, were so immediately part of the production process that the maintenance services in that building were held necessary thereto. In the case at bar, however, the maintenance services are rendered on homes provided on a voluntary basis merely to satisfy the personal needs of employees completely apart from their production activities; and said services are performed in locations physically removed from the situs of the plantation's production activities, including the management, administration, control, accounting and clerical aspects of such activities; and the dwelling houses on which said services are performed are not used in, devoted to, or necessary to, the production process or its administration or management aspects. The *Borden* case is thus distinguishable from the case before the court.

The main cases relied upon by appellees (Br. pp. 53-54), *Basik v. General Motors Corp.*, 311 Mich. 705, 19 N. W. (2d) 142, *Ferguson v. Prophet Co.*, (S. D. Ind. 1946) 11 Labor

Cases, par. 63,297, and *McComb v. Factory Stores Co.*, (N. D. Ohio 1948) 15 Labor Cases par. 64,760, merely hold that employees working in a cafeteria or canteen located in a plant producing goods for commerce are themselves within the coverage of the Act. Holding to the contrary under these circumstances is *Kuhn v. Canteen Food Service, Inc.*, (N. D. Ill. 1944) 9 Labor Cases par. 62,517, appeal dismissed 150 F. (2d) 55 (C. C. A. 7).

Aside from the fact that the cafeteria cases are in conflict with each other, they are readily distinguishable on their facts from the case here. In those cases, as the courts found, the production efficiency of the employees was increased and a higher production level was maintained through the operation of the cafeterias and canteens. *Basik v. General Motors Corp.*, 311 Mich. 705 at 708. In the case at bar, however, there is nothing in the record from which it may be inferred that the appellant's plantation operations are any more efficient because the employees live on the plantation, and as a matter of fact they are not more efficient because of that factor.

Furthermore, in the cafeteria cases practically all the patrons of the cafeteria were the employees of the producer for commerce while in the case at bar many of the dwelling houses are occupied by persons not employed by the appellant (R. 222). Also in the *Factory Stores* case the employees were not permitted to leave the plant premises during their shift even for the purpose of eating lunch. The production employees in those cases were for all practical purposes required to eat at the plant cafeteria. In the instant case, however, the record shows that occupancy of the dwelling houses on the plantation is optional with the employees (R. 221). They can live anywhere they choose, whether on or off the plantation and in fact some of them do live off the plantation (R. 222). Unlike the situation in the cafeteria cases, the housing maintenance employees in the case at bar "serve the needs" of the employees only when the latter are completely separated in space and function from the production of goods for commerce. In the cafeteria cases the cafeteria employees work right in the plant where goods are produced for commerce. Here, the maintenance employees work at the homes of the employees

who *elsewhere* produce goods for commerce and who occupy these homes when they are *not* engaged in production.

Assuming that the cafeteria employees may be engaged in work which is part of an integrated effort for the production of goods for commerce, the housing maintenance employees here do not bear a sufficiently immediate and direct relation to production for commerce to be deemed part of such integrated effort. See cases discussed in appellant's brief pp. 73-75. Such maintenance work is indistinguishable in principle from the essentially local repair activity of plumbers, housepainters and others in local trade in innumerable villages, towns and cities in the United States. Congress never intended to sweep all such local service activities into the coverage of the Act (Appellant's Br. p. 76).

B. If the village maintenance employees are "engaged in [interstate] commerce or in the production of goods for [interstate] commerce," they are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c).

We have shown that if, contrary to the foregoing, the housing maintenance employees are held "necessary to the production of goods" for commerce, then by the same token they are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c) (Appellant's Br. pp. 77-79). In all the cases cited by appellees, the maintenance work was held to be necessary to production covered by the Act; e.g., manufacturing of steel, motors and automobiles. In the case at bar, however, production of sugar cane is wholly exempt under Section 13(a)(6), and production of raw sugar is exempt from overtime under Section 7(c). In no circumstances, therefore, can the overtime requirements of the Act extend to the housing maintenance employees herein.

Appellees contend that housing maintenance employees will frequently be engaged part of the week in the maintenance of houses and part of the week in the maintenance and repair of processing and field equipment (Br. p. 54). When engaged in the latter activities, the appellees go on to say, the employees are engaged in the production of

goods for commerce and therefore they are entitled to the Act's benefits for the entire workweek. We concede that the employees are engaged in the production of goods for commerce while performing such maintenance and repair work. We contend, however, that such employees are not entitled to the Act's benefits because they come under either the Section 13(a)(6) or Section 7(c) exemptions with respect to such production. Appellant's Br. pp. 79-80.

Respectfully submitted,

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In the United States Court of Appeals for the
Ninth Circuit

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPO-
RATION, APPELLANT

v.

CIRACO MANEJA, ET AL., APPELLEES

and

CIRACO MANEJA, ET AL., APPELLANTS

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPO-
RATION, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE

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**In the United States Court of Appeals for the
Ninth Circuit**

No. 11952

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPO-
RATION, APPELLANT

v.

CIRACO MANEJA, ET AL., APPELLEES

and

CIRACO MANEJA, ET AL., APPELLANTS

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPO-
RATION, APPELLEE

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF HAWAII*

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201 et seq.), hereinafter referred to as "the Act." Since this case pre-

sents significant questions concerning the applicability of two of the exemption provisions of the Act, the Administrator with leave of Court, respectfully submits this brief as *amicus curiae*.

STATEMENT OF THE CASE

Since the facts in this case are stated clearly in the findings of fact of the district court (R. 410-437), as well as in the stipulation of facts executed by the parties (R. 129-256), and in their respective briefs, and since the question of the jurisdiction of the district court and this Court is treated adequately in the briefs of the parties, it is deemed unnecessary to include a statement of jurisdiction or a statement of the facts in this brief. The salient points of the decision of the court below are set forth in the three sections of the argument.

This brief will be limited to a presentation of the Administrator's views with respect to the applicability of the Sections 13 (a) (6) and 7 (c) exemptions to various employees of appellant. Because the Administrator has not heretofore expressed an opinion with respect to the Act's applicability to employees engaged in maintaining plantation dwelling houses, no views are here advanced with respect to this issue.

QUESTIONS PRESENTED

1. Which of appellant's employees are "employed in agriculture" as the term "agriculture" is defined in Section 3 (f) of the Act, and are, therefore, exempt from the minimum wage and overtime provisions of the Act under Section 13 (a) (6) thereof?

2. Which of appellant's employees, not so exempt under Section 13 (a) (6), are exempt from the overtime provisions of the Act by virtue of Section 7 (c), which provides that "In the case of an employer engaged * * * in the processing of * * * sugar cane * * * into sugar (but not refined sugar) or into syrup," the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged"?

3. Does Section 7 (c) exempt any of appellant's employees during the so-called "off-season" when no processing operations are being performed?

4. Whether employees who in the same workweek perform work, part of which is of the type described in Sections 13 (a) (6) or 7 (c) and part of which is covered and not subject to any exemption, are exempt from the overtime requirements of the Act.

STATUTORY PROVISIONS INVOLVED

The provisions of the Act which are directly involved in this appeal are as follows:

SEC. 3. As used in this Act—

* * * *

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry

or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

* * * * *

SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 7 (c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; * * *.

* * * * *

SEC. 13 (a). The provisions of Sections 6 and 7 shall not apply with respect to * * * (6) any employee employed in agriculture * * *.

ARGUMENT

I

Section 13 (a) (6) of the Act exempts appellant's employees engaged in cultivating, growing, and harvesting sugarcane and processes incidental thereto, including the transportation of cut sugarcane over portable railroad track to the edge of the field on which it is grown but does not exempt its employees engaged in milling operations or in permanent main line railroad transportation

Section 13 (a) (6) excepts from both the wage and hour provisions "*any employee employed in agriculture*" (italics supplied). It is thus like the coverage provisions of Section 7 which refer to "*any of his employees who is engaged in commerce*" (italics supplied) in that it makes the duties of the employee rather than the business of the employer the test of its application. The fact, therefore, that some of appellant's employees are engaged in agriculture does not necessarily subject all of its employees to the exemption, just as the fact that some of an employer's employees are engaged in commerce does not bring all of his employees within the coverage of Section 7. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.¹

The statute further provides:

SEC. 3. As used in this Act—

(f) "Agriculture" includes farming in all its branches and among other things includes the

¹ Compare the similarly worded exemptions provided in Sections 13 (a) (1), 13 (a) (3), 13 (a) (5), and 13 (a) (10), and contrast 13 (a) (4), 13 (a) (9), and 13 (b) (2) showing a choice of different language when it was intended to make exemption depend upon the type of *employer*.

cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The court below decided that Section 13 (a) (6) extends complete exemption from the wage and hour provisions to planting seed, promoting growth, harvesting, assembling sugarcane for carriage, and associated activities up to that point, including activities in connection with handling the portable track laid on the fields which are used for cultivation and loading and moving the railroad cars while on that track, but that it does not extend to transportation to the mill on the permanent railroad track nor to milling or subsequent operations. The Administrator concurs with this view.

Appellant contends that all of its 1100 employees including those engaged in the operation of its sugar mill and permanent line railroad transportation system are engaged in agriculture by reason of the following part of the definition: "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, in-

cluding preparation for market, delivery to storage, or to market or to carriers for transportation to market." It is the Administrator's view that appellant's mill and permanent line railroad transportation operations are not "incident to or in conjunction with such farming operations."

As the third largest producer of raw sugar in the Territory of Hawaii, appellant employs directly or indirectly in the manufacture of raw sugar hundreds of highly skilled workers² and technicians in its mill and various maintenance and service shops.³ During the year 1945, appellant's direct sugar manufacturing costs approximated \$500,000. Mill production is keyed to a six-day week with around-the-clock operations; the 24-hour day is divided into three 8-hour shifts (R. 183). In the field of transportation, appellant operates a narrow gauge railroad system which includes six 25-ton steam locomotives, one 17-ton steam locomotive, one 12-ton steam locomotive, one 12-ton gasoline locomotive, one 14-ton diesel locomotive, two hundred steel cane cars, and five hundred and twelve

² Appellant has entered into a collective bargaining agreement dated November 19, 1946, with the International Longshoremen's and Warehousemen's Union, Local 145-7, as collective bargaining agent for most of its nonsupervisory employees (R. 136).

³ Appellant, in addition to operating a warehouse, a steam-power room, and electric-power plant as a part of the mill, also maintains a machine shop (R. 195), a welding shop (R. 196), a blacksmith shop (R. 197), a tinsmith shop (R. 197), a cane-loading machine repair shop (R. 198), a tractor repair shop (R. 199), a garage (R. 200), an electric shop (R. 201), a carpenter shop (R. 202), a paint shop (R. 203), a plumbing shop (R. 203), a laboratory (R. 204), and a concrete products plant engaged in producing concrete irrigation flumes and water supply pipe (R. 206).

wooden cane cars (R. 160). This railroad network consists of fifty-six miles of permanent main line track and slightly more than nine miles of portable track (*ibid*). For the proper functioning of this railroad system, appellant maintains a roundhouse (R. 163), employs section men to maintain the main line trackage (R. 162), employs ten crossing watchmen to protect the public at government road crossings (R. 163), and utilizes specially trained personnel to operate the trains (R. 162). During the year 1945, appellant expended over \$210,000 on transportation, more than fifty percent of which was spent on main-line hauling of sugarcane to the mill (R. 116).

As the sole object of appellant's operation is the production of sugar and molasses and as these are manufactured in its mill, it might be argued that the operation of the mill is the dominant element and that the growing of the raw material, sugarcane, is the subordinate or incidental element. It serves no purpose, however, to attempt to determine which is the dominant element because, to accomplish its purpose of producing sugar and molasses, appellant plainly engages in the many separate and distinct enterprises appropriate to that end, including manufacturing, transportation, and farming. The integration of business operations which appellant has accomplished neither conceals the essential non-agricultural character of appellant's transportation and manufacturing activities nor submerges the economic fact that appellant operates a hybrid type of business which has assumed the functions of manufacturer, carrier, and farmer.

In this, appellant occupies a position with reference to the agriculture exemption analogous to the relationship of a chain store corporation to the "retail * * * establishment" exemption provided in Section 13 (a) (2). As there is no exemption for wholesale establishments, and as the central offices and warehouses of such chains serve the economic function of the wholesaler, the Supreme Court has held that "most chain store organizations are * * * of a hybrid retail-wholesale nature," and has denied the "retail * * * establishment" exemption to such central offices and warehouses. *Phillips Co. v. Walling*, 324 U. S. 490, 495. Just as the chain store cannot obtain the retail exemption for its central office and warehouse merely because the services of those units are restricted to exempt retail outlets, so here, appellant should not be able to achieve exemption for its separate carrier and manufacturing undertakings simply because it restricts its carrier and manufacturing functions to the product of its farm.

Nor are all of these "practices" performed "in conjunction with" farming operations, for many of them occur subsequently to and not together with such operations. Processing operations, for example, clearly occur separately from, and subsequently to, the farming operations which produce the raw material for the subsequent activities of the mill. It may be that a more difficult problem is presented by the main-line hauling of sugarcane to the mill, but, for reasons hereinafter presented, it is the Administrator's view that under the facts of this case such hauling is incident to the processing rather than to the farming

operations. In any event, such hauling would not appear to be, as appellant contends, a part of its "harvesting" operations since the "gathering" of crops is completed on the fields on which they are grown prior to transportation on the permanent tracks, and such transportation clearly constitutes neither a "storing" of such crops, nor a transportation to storage. Under the facts here presented, such transportation more clearly appears to be the start of, or incident to, appellant's processing business.

To apply the "agriculture" exemption to appellant's milling and permanent line transportation activities would be to apply in Hawaii a rule at variance with the settled judicial interpretation of the Act which has been applied for years to this country's equally important sugar producing area of Puerto Rico. The Court of Appeals for the First Circuit in the first case presenting the question of the application of the Section 13 (a) (6) exemption to an organization which both grew sugarcane and processed it into raw sugar and molasses held that the exemption did not apply to the processing operation. *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1) (1941). The only significant difference between the facts of that case and the one at bar is that there between 30 and 40 percent of the cane processed was grown by independent growers. The court after disposing of the contention (not made here) that the processing operation fell within that part of the definition which exempts the "production * * * of any agricultural * * * commodities", held that the processing did not come within the section of the definition on which appellant

here relies. The court pointed out that the legislative history demonstrates that the purpose of that provision was "to make certain that independent contractors, such as threshers of wheat who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task should be included within the definition of what are agricultural employees, and also to assist a farmer in getting his agricultural goods to market in their raw or natural state. See 81 Cong. Rec. 7876, 7888." The Court further held:

Furthermore, it would seem that the employees involved in this case would not fall within the reason for the exemption which was accorded to agricultural employees. The Act was drawn not to include the latter because agricultural labor was not subject to the usual evils of sweatshop conditions of long hours indoors at low wages. Also any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation. *Fleming v. Hawkeye Pearl Button Co.*, supra; cf. *North Whittier Heights Citrus Assn. v. National Labor Relations Board*, 109 F. (2d) 76, 80-81 C. C. A. 9th, 1940). For these reasons we reject the appellants' contention that the employees here involved are engaged in agriculture within the meaning of Sec-

tion 13 (a) (6) and Section 3 (f).⁴ [117 F. (2d) at 18.]

While the First Circuit also indicated that the fact that some of the cane processed was grown by independent "colonos" was a ground for holding the processing operation not merely "incidental," the two additional independent grounds of decision quoted above with reference to the legislative history of and reason for the exemption are equally applicable to the case at bar and require the same conclusion.

⁴ Contrary to appellant's inference (Appellant's br. p. 39), the Administrator's recommended legislation to narrow the agricultural exemption with reference to "industrial farms" does not indicate that such of appellant's employees as are engaged in activities which are primarily nonagricultural are exempt under Sec. 13 (a) (6). In his annual reports (Annual Report of the Administrator, 1943-44, p. 8; *id.*, 1944-45, p. 1; *id.*, 1946, pp. 52, 66-68) the Administrator recommended that the Act be extended to cover, and not exempt, hired farm laborers on large industrialized farms, workers who are clearly exempt under the present language of Sec. 3 (f). Such bona fide agricultural workers employed by appellant are concededly exempt under Sec. 13 (a) (6). But the italicized language appearing at p. 39 of appellant's brief indicates nothing more than a recognition by the Administrator that the language of Sec. 3 (f) is broad enough to include employees engaged in activities not primarily agriculture if they are performed by a farmer or on a farm as an incident to farming operations. For example, the building of a grain silo on a farm, whether constructed by a farmer or a building contractor, would be exempt. Neither the language referred to by appellant nor anything else appearing in those reports, however, indicates that the Administrator ever considered such industrialized activities as appellant's processing and incidental operations as exempt under Sec. 13 (a) (6). Neither does such language detract from the weight of the reasoning of the First Circuit, that the industrial nature of this operation is an indication that it was not intended to be exempt as "agriculture."

The significance of these two additional grounds became evident in the case of *Calaf v. Gonzales*, 127 F. (2d) 934 (C. C. A. 1) which dealt with the application of the "agriculture" exemption to employees working on railroad transportation facilities used to transport cane to a sugar mill. The mill, the railroad, and some of the farms on which the cane was grown were all owned jointly by the defendants. Though the railroad was also used to transport cane grown on farms owned severally by the defendants and on one farm owned by an independent "colono," the court expressly refused to base its decision on this fact. It stated, "We place our decision, however, on the broader ground that the transportation of sugarcane is incident to milling rather than to farming and therefore is not exempt under the Act" (127 F. (2d) at 936-937) and proceeded to give reasons for its conclusion just as though this fact on which appellant relies to distinguish the case did not exist. Thus, it stated that "The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation an incident to farming," (id. at 937) and "There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provisions of the Act" (id. at p. 938). It follows, of course *a fortiori* that since the exemption is inapplicable to transportation workers because transportation is in-

cident to milling rather than farming, it is also inapplicable to mill employees under the same circumstances.

The reasons announced in the *Bowie* case, which support the argument that the agriculture exemption should be denied mill employees regardless of the ownership of the farm lands, and the rationale of the *Calaf* case specifically putting such considerations aside in the field of transportation, have also found expression in a case where, like the case at bar, one employer owned all the farm lands, the transportation facilities, and the mill (*Vives v. Serralles*, 145 F. (2d) 552 (C. C. A. 1). There the "concentration point" is indicated as the place where the agriculture exemption ends. The "concentration point" is fixed with reference to the three types of transportation that were used on the growing fields. One of these types was practically identical with the transportation system used in the case at bar. It is described by the Court as follows:

The cane is hauled to the concentration point in various ways; in small railroad cars pulled by oxen over portable tracks to a siding or switch where the cars are picked up by locomotives operated on the permanent tracks; * * * [145 F. 2d. at 553]

Except for the inconsequential detail that appellant used tractors rather than oxen in that part of the transportation which occurred in the growing fields over portable tracks, appellant's system of rail transportation is identical (R. 161).

The reasons which led the Court of Appeals for the First Circuit to fix the point at which the portable

tracks meet the permanent tracks as the dividing line between activities which are exempt under Section 13 (a) (6) and activities which are not, are equally applicable to the case at bar. In the *Serralles* case it was pointed out that the wages of laborers in the field engaged in operations up to the "concentration point" were regulated by the Secretary of Agriculture, under The Sugar Act of 1937 (50 Stat. 903; 7 U. S. C. § 1100 et seq.). The need for a clear dividing line between the coverage of the two Acts, therefore, suggested the concentration point as a useful point of cleavage. The fact that this point also marked the end of the "harvesting" operation according to the interpretation of the Administrator and the view of the court was regarded as decisive. These facts and considerations are equally applicable to the case at bar.

In holding transportation incident to milling, the court in the *Calaf* case pointed to certain factual "guides" which were felt to have compelling force in reaching that decision. The court deemed it significant that the workers were all employed by the mill and had their names on the mill payroll, that the locomotives and cars had their depot at the mill and moved from the mill to the fields and back, and that the persons engaged in the transportation of sugarcane did not engage in agricultural work (see 127 F. (2d) 937). In the instant case, similar facts are present. Employees engaged in mainline transportation activities are specially skilled workers under the general supervision of the Cane Processing Superintendent rather than the Field Superintendent (R. 234-235), and do not engage in agricultural work in the fields (R. 162-

163). On the other hand, employees operating portable track plows, portable track lifting machines, cane-loading machines, and haul cane tractors are under the general supervision of the Field Superintendent and work in the fields (R. 230-233). The locomotives and empty cars move from the mill to the fields, and return to the mill with sugarcane for processing (R. 161). Railroad car and locomotive maintenance occurs not in the fields but at the plantation roundhouse and in a space adjacent to the plantation machine shop, an area devoted to milling and other nonagricultural operations (R. 234). Furthermore, appellant's bookkeeping accounts showing that both processing and transportation expenses are considered separate and distinct from those charged to field activities, such as cultivation and harvesting (R. 116), indicates that employees engaged in processing and transportation are carried on pay rolls other than the one used for field employees. These factors, we submit, are equally compelling here.

We agree with the comment in appellant's brief (p. 46) that the statement in the *Calaf* case (127 F. (2d) at 937, 938) that "We would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm" related to the situation subsequently presented to the same court in the *Vives* case. That case, however, exempted only workers whose work related to that part of the transportation which took place on the growing fields and did not extend to any transportation on permanent railroad lines. The permanent line

transportation here is not "on the farm" in this sense as appellant argues. While it takes place on the "plantation," that word is defined in the stipulation simply as the geographical area (9,663 acres) on which appellant "is producing sugarcane, processing it into raw sugar and conducting related operations" (R. 130). It is obvious that cane cannot be grown on the right-of-way occupied by appellant's 56 miles of permanent mainline railroad track, whereas it can be and is grown on the fields on which the portable track is laid at harvest time in the *Vives* case and this case. The point where the two join should be held to be the point where the "agriculture" exemption ends in this case just as it was so regarded in the *Vives* and *Calaf* cases.

The view adopted by the decisions of the First Circuit Court of Appeals and urged herein became at an early date and has long remained the official position of the Administrator. In an effort to represent the contrary, appellant cites the statements in the Administrator's interpretative Bulletin No. 14, that the transportation of cane by the grower to his mill might be considered incident to growing and that the manufacture of raw sugar in the mill in such circumstances might be considered as preparation for market. That document, issued in 1939, was a general discussion of all of the many ramifications of Sections 7 (c), 13 (a) (6) and 3 (f), and 13 (a) (10). Prefatory to all of its discussion, it expressly stated "This bulletin will set forth the construction of these sections which will guide the Administrator in the performance of his administrative duties *unless he is*

directed otherwise by authoritative rulings of the courts or unless he shall subsequently decide that his prior interpretation is incorrect.” (Italics supplied) 1940 ed. W. H. Manual p. 180. Accordingly, as early as September 1941, after the authoritative decision in the *Gonzalez* case, the Administrator withdrew his interpretation that “manufacturing raw sugar” might possibly be included within the term “preparation for market” contained in Sec. 3 (f). In Release R-1568, published in 1942 ed. W. H. Manual p. 408, it was stated that in the light of that decision “it appears that the Wage and Hour Division went too far in expressing the view * * * that if a sugar mill owner grinds only the cane which he grows himself the exemption for agricultural employees may possibly apply under some circumstances to his mill employees.” “It would seem,” the Administrator stated, “from the court’s decision [in the *Bowie* case] that the exemption for agricultural employees * * * does not apply to sugar mill employees, even if the only cane ground in such a mill is cane grown by the sugar mill owner in his own fields” (ibid.). Since that time this view has been consistently expressed to members of the public who have sought advice and guidance from the Administrator with respect to the Act’s applicability.

Contrary to the statement in appellant’s brief (p. 47), the Administrator’s view as expressed in Par. 10 (f) of Interpretative Bulletin No. 14, to the effect that the transportation by a mill owner to his mill of sugarcane he grows may be exempt under Section 13 (a) (6) has been modified, although it does not

appear that such modification was ever specifically or formally published as a change in the Interpretative Bulletin. However, in the Administrator's Release G-322 dated May 20, 1943, published incident to his approval of the Wage Order Part 635, for the Sugar and Related Products Industry, 8 F. R. 7098, 1944-1945 W. H. Manual 347, and in the transcript of the proceedings of the Industry Committee therein mentioned, it appears that the representative of the Hawaiian Sugar Planters Association objected to the definition of the industry contained in the Order because it appeared to include transportation workers among those entitled to the minimum wage. He advanced substantially the same argument with reference to exemption that appellant here advances. The Administrator overruled this objection on the ground that the Order would not in any event apply to anyone who was exempt under Section 13 (a) (6). He stated that whether certain individuals were exempt would be a question of fact to be determined upon the basis of all the evidence and the applicable rules of law. In this connection he specifically called attention to the *Calaf* decision, which he construed as holding the exemption "inapplicable to employees engaged in transporting sugarcane from their employer's farm to their employer's sugar mill even though the cane was grown by the employer of the employees in question." That the Administrator had adopted the *Calaf* decision as his interpretation notwithstanding possible contrary implications in Interpretative Bulletin No. 14, is further illustrated by the following paragraph of a letter from Mr. William B. Grogan, acting for

the Administrator, to Mr. Paul E. Guillot, Dugas & LeBlanc, Ltd., Paincourtville, Louisiana, dated November 26, 1942:

It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of section 13 (a) (6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf v. Gonzalez*, 127 F. (2d) 934 (C. C. A. 1), indicates that the mere fact that owners of sugarcane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill "incident to farming" and therefore exempt under section 13 (a) (6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13 (a) (6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin 14 will enable you to determine which of your employer's employees are engaged in "agriculture" and therefore within the scope of the section 13 (a) (6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act.⁵

⁵ The principles which the Administrator feels should be applied in determining whether transportation is incident to farming or milling were stated more precisely in letter dated October 9, 1946 (written sometime prior to the institution of the instant suit), from the Deputy Administrator to Mr. James Marshall, Director of the Sugar Branch, Production and Marketing Administration, United States Department of Agriculture, in which it was stated: "There are situations in Puerto Rico, however, where the farm and centrale are under common ownership. The mere fact that

The language of the statute, the requirement of strict construction, the legislative history, the eco-

the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the farm to the mill is 'incident to farming' and therefore exempt under section 13 (a) (6). In such a situation, it becomes a question of fact whether the truckers are employed by the plantation in work incidental to farming operations, so that they would be exempt under section 13 (a) (6), or whether they are employed by the centrale in work incidental to milling operations which would not be exempt. In deciding this question the Divisions have adopted the tests used by the court in *Calaf Collazo v. Gonzalez*, 127 F. (2d) 934. Thus, where the employees on the farm pay roll, report to the farm for instructions and at the end of the day, are generally supervised from the farm, perform agricultural work on the farm, and where the trucks are stored and maintained on the farm—these are factors indicating that the employees are performing work which is an incident to the farming operations. On the other hand, where the employees are on the mill pay roll, are supervised from and report to the mill, and perform other work at the mill, these factors would indicate that the work of the employees is incidental to the milling operations."

Appellant's discussion of the Administrator's position without mention of such opinion letters is perhaps understandable in view of the fact that they do not appear to have been made the subject of a press release nor were they printed in the commercial labor law reporting services. This brief does not deal with the question whether or to what extent appellant may be held liable if appellant was in fact unaware that the Administrator took the position expressed in these letters, and relied on the statement in the Bulletin, notwithstanding the *Calaf* decision and the Administrator's reference to that decision in the Wage Order proceedings. These factors would have pertinence in determining liability to employees under Section 16 (b) of the Act for wages due them for their past employment, in connection with the "good faith" element in defenses which might be raised under Sections 9, 10, and 11 of the Portal-to-Portal Act of 1947. The fact, however, that these letters may not have come to appellant's attention in the past does not detract from their pertinence, particularly in this litigation where appellant seeks the declaratory judgment of the Court for its guidance in its future operations.

conomic facts, the well-settled judicial rule, and the administrative interpretation of long standing, all point, therefore, to the conclusion that Section 13 (a) (6) of the Act exempts appellant's employees engaged in producing sugarcane and processes incidental thereto, including the transportation of cut sugarcane over portable railroad track to the edge of the field on which it is grown, but does not exempt its employees engaged in milling operations or in permanent main-line railroad transportation.

II

Employees engaged, during the grinding season, in hauling, repair, and maintenance activities at the "place of employment" where appellant is engaged in "processing" of sugarcane are exempt from the overtime provisions of the Act by virtue of Section 7 (c). But employees engaged in such activities elsewhere than at such "place" of "processing," or during the "dead season," are not exempt under Section 7 (c)

Section 7 (c) provides that "In the case of an employer engaged * * * in the processing of * * * sugarcane * * * into sugar (but not refined sugar) * * * [the overtime provisions of the Act] shall not apply to his employees in any place of employment where he is so engaged." This exemptive provision was held by the court below to be applicable only to those of appellant's employees who were engaged in processing activities or in activities incidental thereto at appellant's mill during the time that cane processing operations were actually being conducted or during temporary break-downs with the operating staff present and awaiting completion of the repairs (R. 442-444). To the extent that the decision of the

district court denies the exemption during the processing season to employees engaged in hauling who perform some duties at the mill, as, for example, unloading of sugarcane, and to employees engaged in shipping raw sugar out of appellant's sugar warehouse which is connected by a conveyor belt to the mill building (R. 185), that decision excludes from the exemption employees who, in the Administrator's opinion, are reasonably within its scope. Further, the holding of the court below that the exemption is inapplicable during the temporary 24-hour weekend shut-down for routine maintenance restricts the scope of the exemption more narrowly than the Administrator has construed it. However, the Administrator believes the decision below correctly held the exemption inapplicable to transportation, repair, and maintenance, employees not engaged at the "place of employment" where their employer is engaged in processing sugarcane, and that appellant's claim of exemption under 7 (c) for all employees not found exempt under Section 13 (a) (6) (appellant's brief, p. 51) cannot be sustained.

a. While some of appellant's transportation, repair and maintenance employees are engaged in "processing" activities within the meaning of Section 7 (c) at the "place of employment" where appellant is engaged in the "processing" of sugarcane, other transportation, repair and maintenance employees are not so engaged

Appellant's contention rests upon two assumptions: (a) that insofar as appellant is not held to be engaged in producing sugarcane, it must be held to be engaged in processing cane into raw sugar or in activities necessary and related thereto (appellant's brief, p. 53), and (b) that all of the employees not found

exempt under Section 13 (a) (6) “work on the same premises where their employer is ‘processing * * * sugarcane * * * into sugar’ ” (appellant’s brief, p. 54). Neither assumption, we submit, finds support in the terms of the exemptive provision. A number of appellant’s employees, as shown by the stipulated facts, are engaged in some activities which are not closely and directly related either to the production of sugarcane or to the processing of sugarcane into sugar; in other instances employees work at a “place of employment” elsewhere than where appellant is engaged in the processing of sugarcane into sugar.

While the legislative history of Section 7 (c) is clear enough as to the general purpose underlying the granting of the exemption,⁶ it affords little aid in determining the precise breadth and applicability of the exemption granted by the particular language adopted by the Congress.⁷ The applicability of the exemption must be determined by the “normal and spontaneous meaning of the language” (*Kirschbaum Co. v. Walling*, 316 U. S. 517, 524) which the Congress chose to define the class of persons exempted. From the plain language of Section 7 (c), the exemptive provision is

⁶ “It was the purpose of Congress, in granting this exemption [Section 7 (c)] to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control.” *Walling v. Swift & Co.*, 131 F. (2d) 249, 251 (C. C. A. 7).

⁷ The legislative history cited by appellant (brief, p. 56) merely demonstrates that an exemption is granted to sugarcane processing—which is obvious from the language of section 7 (c)—but it is of no avail in determining what is the scope of “processing” or “place of employment where he is so engaged.”

applicable, first, only in the case of an employer engaged in a described operation (in the instant case, processing of sugarcane), and, second, only as to those of his employees who work in a “place of employment where he is so engaged.” Obviously, the exemption is not co-extensive with *all* of the activities that may be undertaken by an employer who *inter alia* engages in the processing of sugarcane. To be within the exemption the employees must be engaged in the operations described in Section 7 (c) (i. e., processing of sugarcane), or in operations that are a necessary incident to the described operations and, in addition, they must be working in such operations *in* the “place” where their employer is engaged in such processing. On the other hand, employees who work in a “place of employment” where their employer is *not* engaged in the actual processing of sugarcane albeit he may at that place be engaged in activities which, in a broad sense, may be incidental or necessary to such processing, are not within the terms of Section 7 (c).

Appellant argues that the “place of employment where he is so engaged” can include appellant’s whole “plantation” which is defined in the stipulation as comprising the geographical area on which appellant produces sugarcane, processes it into raw sugar, and performs related operations (R. 130). The same reasons heretofore advanced to demonstrate that this entire enterprise is not a “farm” make it equally clear that all the various buildings and premises comprising the “plantation” cannot reasonably be deemed the “place” where appellant is engaged in the process-

ing of sugarcane. Appellant's contention reads out of the exemptive provision the phrase "where he is so engaged" which seems clearly intended to limit the exemption to employees working in the particular "place" *in* which the employer is actually engaged in the processing operations. When such a "place" is an establishment exclusively devoted to operations specifically mentioned in Section 7 (c), every employee working in such a plant ordinarily will be either actually engaged in the described operations, or in an occupation so closely integrated and incidental to the described operations as to be virtually a part thereof, and moreover all will be working solely in the place or portion of the premises devoted by the employer to such operations. Thus, where a sugar mill is exclusively engaged in processing sugarcane into sugar all employees who work solely in the mill, of course, come within the scope of the exemption. In such a case, where contiguous buildings or areas located on the same premises and operated as a unitary establishment devoted to the described operations constitute a single "place of employment," the entire establishment is a "place of employment where he is so engaged."⁸ On the other hand, where only certain

⁸ It would seem clear, as a correlative concept, that even though contiguous and located on the same premises, several buildings or areas are not always or necessarily component parts of a single place of employment. For example, a contrary conclusion would appear proper where any such building or area is organized and operated as a self-sufficient unit and the operations performed therein are performed independently of operations in the surrounding buildings or areas. Thus, in doubtful cases, factors other than geographical contiguity, such as interchange of person-

departments, areas, or buildings within an employer's premises are devoted to the described operations, the remaining departments, areas, or buildings cannot be deemed to be part of such "place of employment" without doing violence to the statutory language and the firmly established rules of statutory construction.

The foregoing views are fully supported by the decision in *Fleming v. Swift*, 41 F. Supp. 825 (N. D. Ill.), affirmed 131 F. (2d) 249, which is the judicial authority most directly in point on this issue. The Swift Company was engaged in acquiring and slaughtering livestock and in the processing, manufacturing, and distributing of meat, meat products, and byproducts from livestock. Concluding that the description of operations and processes in Section 7 (c) places "a functional limitation on the classes of employees for whom an exemption from the overtime provisions may be claimed," the court held that the exemption applied on a department basis and not to defendant's whole plant. 41 F. Supp. 831. Thus the court carved out for exemption only those departments of the meat-packing plant in which "handling," "slaughtering," and "dressing" operations were performed and held that the portions of the plant devoted to those operations constituted the "place of employment," and that employees in other departments, such as those devoted to meat-curing or sausage-making, were not within the scope of the exemption. To the same effect, see *Walling v. Bridgeman-Russell*, 2 W. H. Cases 785 (D. Minn.); *Colbeck v. Dairyland Creamery Co.*, 17 N. W.

nel, flow of raw materials, payroll records, and techniques of supervision of the employees may have to be considered.

(2d) 262 (S. Ct. S. D.); *Shain v. Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.); *Walling v. De Soto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.). The *Bridgeman-Russell* case involved an establishment in which the processing of butter and cheese as well as other activities not within the scope of the Section 7 (c) exemption occurred. Holding that maintenance employees in that establishment were not exempt, the court stated (*id.* at 790) :

“* * * Place of employment” means those portions of an establishment devoted by the employer to first processing operations * * * [and] the exemption is applicable to any employees who perform exclusively the operations described in this Section, and * * * employees who * * * are engaged exclusively in operations which are a necessary part thereof and perform such duties in those portions of the premises devoted by the employer to “first processing” operations.

Subsequent to the decision in the *Swift* case, the Administrator issued Release R-1892, dated January 1943, a copy of which is attached as an Appendix, setting forth at length the Administrator's views on the scope of the exemption. It was there stated that in the Administrator's opinion “the section 7 (c) exemptions are applicable to the following two groups of employees: (1) Those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations.” And, as appellant points

out, the Release further stated that "when an establishment is *exclusively* engaged in activities enumerated in the section [7 (c)] all of the employees of the operator of the establishment who work solely in that establishment * * * come within the scope of these exemptions * * *." [Italics supplied.] In accordance with this interpretative position, appellant's employees engaged at the mill in activities that directly, or as a necessary incident constitute the processing of sugarcane are within the scope of the exemption. And, further, the Administrator believes that it appears proper and reasonable to include within this exempt classification employees who are engaged in shipping raw sugar out of the sugar warehouse which is connected by a conveyor belt to the mill building itself (R. 185), since operations there performed are, for all practical purposes, a necessary incident to the processing of cane, and the physical relationship between the warehouse and the mill is such that it may be regarded as part of the same place where appellant is engaged in processing operations.

While we believe the court below was in error in denying the Section 7 (c) exemption to all of the employees engaged in the transportation of sugarcane to the mill, appellant appears to have oversimplified the problem presented when it argues that all of these employees are necessarily exempt under Section 7 (c) as engaged in operations incident to processing. Even assuming that they all are so engaged, nevertheless the question still remains whether they work at a "place of employment" where their employer is en-

gaged in the processing operations. Clearly, some transportation employees do not. Transportation employees, for example, whose duties are performed in areas far removed from the mill and the processing operations, such as track maintenance men and guards at grade crossings, are not employed in a "place of employment" where their employer is engaged in the processing operations. On the other hand, transportation employees who perform some duties at the mill as, for example, the unloading of sugarcane, may reasonably be said to be engaged in the "place of employment" where the appellant engages in processing, within the scope of the exemption. As it is clear from Part I of this argument that their work is incident to processing and thus also satisfies the other requirement for exemption under Section 7 (c), the decision of the court below, to the extent that it denied the exemption to such employees, is contrary to the interpretation the Administrator has followed.

In many of the other buildings or areas utilized by appellant, however, such as the maintenance shops, not only are the premises not devoted to the performance of the operations described in Section 7 (c) but portions of these premises are actually devoted to occupations not closely or directly related to the processing activity which is the subject of the exemption. Thus, the repair and maintenance shops service the transportation facilities as well as the mill. Employees engaged in this type of activity are at best only partially engaged in activities incidental to processing; but they are not employed in a "place of employment" where the operations described by Section

7 (c) are performed, and, therefore, we believe were correctly held outside the scope of the exemption.

b. Employees who are within the scope of the Section 7 (c) exemption during the processing season continue exempt during week-end and other short shut-downs, but are not so exempt during the "dead season"

The district court held that the Section 7 (c) exemption is inapplicable to employees engaged in mill repair and maintenance work during the "dead season," a period of approximately three months each year when processing operations have been definitely suspended and major maintenance and repair activities are undertaken, and, also, to employees similarly engaged during the week-end shut-down. The "dead season" ruling, we submit, is consistent with the legislative purpose of Section 7 (c), and in accord with judicial authority. But the holding that the exemption is inapplicable during the 24-hour week-end shut-down is contrary to the Administrator's view.

While employment in the "place" where the processing is carried on is a necessary condition to the applicability of the exemption, the words "place of employment," as appellant contends (br., p. 66), are not the controlling words in determining the applicability of the exemption during the dead season. The language of the section is clear that the exempt employees must be employed in a "place" where the employer *is* engaged in one of the processing operations. But it is not enough that the "place" is devoted to activities related in some way, or necessary, to processing which may ultimately take place; it is also essential that at the time these activities occur, the employer *is* engaged in processing. During the

“dead season,” however, when processing operations are completely and definitely suspended for a period of approximately three months, it is stretching the statutory language considerably to conclude that the processing operations are being engaged in by appellant. See *Maisonet v. Central Coloso, Inc.*, 2 W. H. Cases 753 (D. P. R.). In the *Maisonet* case the issue was squarely presented whether the employees were entitled to receive overtime pay during the dead season. The court, in holding that the exemption was inapplicable, since their employer was not engaged in processing at that time, noted that the economic conditions with which the exemption is supposed to be concerned do not obtain during the dead season, and that the mill could easily spread employment sufficiently during that season so as to avoid the necessity of overtime work. To the same effect, see *Heaburg v. Independent Oil Mill, Inc.*, 5 Wage Hour Rept. 777 (W. D. Tenn.), in which the court pointed out that “the ‘dormant’ season activities * * * such as maintenance, repair, clerical, and sales work while incidental to and connected with the defendant’s business of the ‘processing of cottonseed’ is not ‘processing’ within the intent of the Act and is not sufficient to bring the employer within the exemption 7 (c) during such period.” See also *Abram v. San Joaquin Cotton Oil Co.*, 6 Wage Hour Rept., 312 (S. D. Calif.).

As in the cases cited above, appellant’s three-month “dead season” is a period devoted to repair and maintenance work on a vast scale, designed perhaps more to safeguard its capital investment and for the installation of improvements (R. 212-213) than to in-

sure the uninterrupted functioning of the mill during the harvest season. On the other hand, the maintenance and repair work performed during the 24-hour week-end shut-down which occurs weekly during the grinding season is primarily concerned with keeping the mill operating at a time when the processing operations must be carried on with a minimum of interruption. These activities, therefore, are very closely related, in time as well as functionally, to the actual processing operation itself. The district court's decision with respect to the week-end shut-down appears to prove too much. Carrying the district court's view to its logical conclusion, the exemption would become inapplicable during any period in which the processing operation was suspended, however temporary such a period may be. In effect then, repair and maintenance employees would never be exempt under Section 7 (c), a result we do not believe contemplated by either the language or purpose of the exemption.

The Administrator has consistently expressed the opinion that the Section 7 (c) exemption is inapplicable during the "dead season." See Release R-1892, Appendix, *infra*, p. 45. The statements attributed to him and the Secretary of Labor (see appellant's brief, p. 68) that the Section 7 (c) exemption is a "52-week overtime exemption" is not, as appellant suggests, irreconcilable with his position that "dead season" work is nonexempt, for it is clearly implicit in the language of these statements that they are based on the premise that processing operations are being conducted during the entire year. If they

are, then the exemption is an "absolute" year around exemption. But where, as here, they are not, then the exemption is applicable, in the language of the provision, only during such seasons as the employer *is* engaged in processing operations.

III

When an employee in the same workweek performs both work exempt under Section 13 (a) (6) or Section 7 (c) and covered nonexempt work, he is entitled to receive the minimum wage and overtime benefits of the Act

The Administrator believes that the decision below correctly held that an employee is entitled to the minimum wage and overtime benefits of the Act for work performed in any workweek in which he performs both exempt and covered nonexempt work. Appellant's contention that since "an insubstantial amount of engagement in commerce or the production of goods for commerce are insufficient to subject an employee to the Act, it follows that an insubstantial amount of nonexempt work should not defeat the application of an exemption otherwise applicable" (br., p. 71) is directly contrary to the firmly established rules of statutory construction that the coverage of remedial legislation is to be broadly interpreted so as to be inclusive rather than exclusive whereas exemptions from such legislation are to be strictly construed. *Phillips Co. v. Walling*, 324 U. S. 490; *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101 (C. C. A. 9); *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8). Equally lacking in merit is appellant's other contention that a denial of a tolerance for non-exempt work is without justification. In view of the

breadth of Sections 13 (a) (6) and 7 (c), which extend exemption not only to those directly engaged in the operations specifically mentioned, but to others whose work is "incident to or in conjunction with" such operations (Section 13 (a) (6)) or who perform incidental work in the same place of employment (Section 7 (c)), there is no occasion to broaden them further by a "tolerance" allowance.

In refusing to "extend an exemption to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co. v. Walling*, 324 U. S. 490, 493), the courts have uniformly refused to interpret exemptions in such a manner as to exempt activities which Congress obviously did not intend to exclude from the scope of the Act. The problem has usually arisen, as in the instant case, where both exempt and nonexempt activities are involved. Thus where exemptions have been provided for "any employee" of designated types of employers, the courts have held that if the employer engages in activities other than those intended to be exempted, employees in the nonexempt phase of his business are not exempt despite the literal wording of the exemption. *Walling v. Connecticut Co.*, 154 F. (2d) 552 (C. C. A. 2); *Davis v. Goodman Lumber Co.*, 133 F. (2d) 52 (C. C. A. 4); *Wabash Radio Corp. v. Walling*, 162 F. (2d) 391 (C. C. A. 6); *Western Union Telegraph Co. v. McComb*, 165 F. (2d) 65 (C. C. A. 6); *Nelson v. Agwilines*, 70 F. Supp. 497 (S. D. N. Y.); *Jackson v. Northwest Airlines*, 70 F. Supp. 501 (D. Minn.). And if exempt and nonexempt characteristics of a business are so intermingled as to be

inseparable, the exemption will be denied entirely. *Collins v. Kidd Dairy & Ice Co.*, 132 F. (2d) 79, 80 (C. C. A. 5); *Guess v. Montague*, 140 F. (2d) 500, 503 (C. C. A. 4); *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.). See *Phillips Co. v. Walling*, 324 U. S. 490, 496. Similarly, where exemptions depend on the particular duties performed by employees, the performance of both exempt and non-exempt activities by an employee in the same work-week results in the loss of the exemption. *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (C. C. A. 5); *Anderson v. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C. C. A. 2); *Shain v. Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.); *Walling v. DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 at 943 (D. Minn.); *Fleming v. Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.); *Walling v. Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wis.); *Sykes v. Lochmann*, 156 Kan. 223, 132 P. (2d) 620; *Jordan v. Stark Bros. Nurseries*, 45 F. Supp. 997; *Walling v. Bridgeman-Russell*, 2 W. H. Cases 785 (D. Minn.); *Loeb v. Ideal Packing Co.*, 7 Wage Hour Rept. 397 (Wis. C. C., Mil. Co., 1944); *Gaskin v. Clell Coleman & Sons*, 5 Wage Hour Rept. 581 (Ky. C. C. Mercer Co., 1942).

The operation of the above rule in a case involving the Section 7 (c) exemption is well illustrated by the decision in *Shain v. Armour & Co.*, *supra*. Although the major part of the plant's activities were devoted to the processing of butter and the employer therefore contended that all of his employees were exempt, only those employees "as devote their time *exclusively* to

the first processing of cream into butter" were held to be within the exemption (6 Wage Hour Rept. 715). [Italics supplied.] And, the court specifically denied the exemption to employees who "devote part of their time during the workweek to duties other than the first processing of cream into butter" (*ibid*). Similarly, in *Walling v. Bridgemen-Russell*, *supra*, the Section 7 (c) exemption was only deemed applicable to employees "who perform exclusively the operations described in this Section" (2 W. H. Cases at 790), and once again, the exemption was specifically denied if "during any part of the workweek, the employee performs duties which do not fall within the scope of the exemption" (*ibid*). To the same effect in additional cases involving the Section 7 (c) and Section 13 (a) (6) exemptions, see *Fleming v. Swift & Co.*, *supra*; *Jordan v. Stark Bros. Nurseries*, *supra*; *Walling v. DeSoto Creamery & Produce Co.*, *supra*; *Walling v. Peacock Corp.*, *supra*; *Sykes v. Lockmann*, *supra*; and *Loeb v. Ideal Packing Co.*, *supra*. For similar rulings with respect to other exemptions, see *North Shore Corp v. Barnett*, 143 F. (2d) 172 (C. C. A. 5) (employee engaged as telephone switchboard operator within meaning of Section 13 (a) (11), who also performed other duties of a nonexempt nature); *Anderson v. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C. C. A. 2). See also *Wabash Radio Corp v. Walling*, 162 F. (2d) 391, 394 (C. C. A. 6).

Thus, the courts have recognized that if more than lip service is to be paid to the principle that "any exemption from [this] humanitarian and remedial leg-

isolation must * * * be narrowly construed" and not extended "to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co. v. Walling*, 324 U. S. 490, 493), exemptions cannot be held applicable to an employee or an employer simply because he engages in some exempt work if he also engages in other work which Congress clearly intended to subject to the statutory standards. Any other interpretation would open the door wide to evasion of the purpose of the Act to eliminate substandard labor conditions. It would result in cutting across and absorbing into the exemptions parts of industries and activities plainly covered by the Act, simply because the same employees or employers happened to engage in several kinds of activities.

The position taken by the courts in the foregoing cases and by successive administrations over a period of years (see Interpretative Bulletin No. 14, par. 37, p. 22) accords with the evident intent of Congress in defining with extraordinary particularity the scope of the exemptions here in question. Congress did not merely exempt by Section 13 (a) (6) employees "employed in agriculture." It went further, and, in Section 3 (f) gave a very detailed definition of agriculture which included not only traditionally agricultural activities but also "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." This language in itself provides a very broad tolerance for activities which are not of a strictly agricultural nature. In addition, Congress provided other exemptions for related processing activities in

Sections 7 (c) and 13 (a) (10) of the Act. The legislative history indicates that these exemptions were considered together and were intended to be a comprehensive and exclusive list of the activities in this field which Congress desired to exempt. As the courts have also emphasized, all the sections relating to these exemptions “are in *pari materia* and must be construed together to form a consistent whole, if possible.” *Bowie v. Gonzalez*, 117 F. (2d) 11. Applying these established principles, it seems clear that the detailed language of the statute is so explicit with regard to the scope of the exemption for employees employed in agriculture that no additional tolerance for nonagricultural work can be justified if the intention of Congress is to be given effect.

The situations cited by appellant where the Administrator has allowed a tolerance for nonexempt work are distinguishable from those presented by the exemptions provided in Sections 7 (c) and 13 (a) (6) which are involved in this case. The cases cited in footnote 1 in Appendix E to appellant’s brief deal with the Section 13 (a) (1) exemption which expressly grants the Administrator the power to define by regulation the exempt classifications which are merely identified in the Act only in the most general terms. As the tolerances are expressly provided in the regulation, no question of judicial interpretation is presented, and the cases cited by appellant in connection therewith are not in point.

The cases of *Morris v. McComb*, 332 U. S. 422; *Pyramid Motor Freight Corp. v. Ispass*, 330 U. S.

695, and *Levinson v. Spector Motor Co.*, 330 U. S. 649, are also inapplicable because they arise under the exemption provided in Section 13 (b) (1) which depends for its application upon whether the activities of an employee come within the jurisdiction of another governmental agency. As there was a manifest Congressional purpose to avoid dual regulation, it was necessary to curtail the application of the Fair Labor Standards Act since "every expansion of the jurisdiction of the (Fair Labor Standards) Act through interpretation of paragraph 13 (b) (1) cuts down the jurisdiction of the Commission" (*Levinson* case, 330 U. S. at 682). No question of dual regulation is involved in considering the exemptions here in issue.

The other exemptions cited by appellant where the Administrator has allowed and the courts have approved a tolerance for nonexempt work, are ones where the exempt occupation is designated only by an undefined word or phrase rather than by a precise definition such as is provided in Section 3 (f) and in Section 7 (c). As it is felt that those exemptions were intended to apply to the typical situations or employees designated, the related activities typically found in those situations and occupations should not be regarded as defeating those exemptions. Thus Section 13 (a) (2) exempts employees employed in a "retail * * * establishment." Such establishments generally make a few non-retail sales. Consequently a tolerance has been held appropriate. This explains the decision in *Northwestern Hanna Fuel Co. v. McComb*, 166 F. (2d) 932 (C. C. A. 8); *Harris*

v. *Hammond*, 145 F. (2d) 333 (C. C. A. 5), certiorari denied 324 U. S. 859; and *Brown v. Minngas Co.*, 51 F. Supp. 363 (D. Minn., 1943).

The Administrator is firmly of the opinion that the tolerance specifically provided by the particularized language of the agricultural exemptions need not be broadened to accomplish the purposes of these exemptions, whereas the tolerances permitted in certain other sections are necessary to give substance to those sections.

CONCLUSION

The judgment of the court below should be modified in accordance with the views herein expressed, and, as so modified, affirmed.

Respectfully submitted.

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APPENDIX

U. S. DEPARTMENT OF LABOR

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

OVERTIME EXEMPTIONS FOR PROCESSING OF AGRICULTURAL COMMODITIES CLARIFIED UNDER WAGE-HOUR LAW

[For Release Monday, January 25, 1943]

A clarification of the interpretations of the exemptions from the hours provisions of the Fair Labor Standards Act provided by section 7 (c) of the Act was issued today by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor. The clarification deals with the Division's position on processing of agricultural commodities. It is the result of certain judicial decisions and the Division's experience with economic and administrative problems relating to these exemptions, and is intended to effectuate more completely the intent of Congress as evidenced by the terms of the statute.

Mr. Walling stated that any revised interpretations contained in the clarification which involve a narrowing of the exemption would not be adopted for enforcement purposes until March 1, 1943. This will give the industries affected an opportunity to appraise the effect of the changes, and to plan any modification of their operating methods which they may deem appropriate, without the risk of governmental action based upon failure to comply with the Division's interpretations as revised. He also pointed out, however, that his enforcement policy could not of

course bar the right of employees to maintain independent suits under section 16 (b) of the Act.

Section 7 (c) provides that "in the case of an employer engaged" in certain described operations on seasonal agricultural commodities, the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged." The exemption extends throughout the year for some types of operations, but is limited to 14 workweeks annually for others.

A. Employees Who Are Exempt

In the case of *Fleming v. Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.), the Court held that the exemption provided by section 7 (c) for "handling, slaughtering, or dressing * * * livestock" is applicable to those employees who are actually engaged in such operations, and, in addition, to "any employee whose employment during any workweek is wholly within the place of employment, as herein defined, and who during that workweek is working exclusively in an occupation which is a necessary part of the handling, slaughtering, or dressing of livestock." "Place of employment" was defined as "those portions of the plant devoted by the employer to the handling, slaughtering, or dressing of livestock."

Since all of the exemptions provided by section 7 (c) are phrased in the same general language and since they are all applicable to the packing or processing of seasonal agricultural commodities, the Administrator has concluded that the holding of the Court quoted above not only applies to the handling, slaughtering, or dressing of livestock, but also to all of the other section 7 (c) exemptions. It is therefore his opinion that the section 7 (c) exemptions are applicable to the following two groups of em-

ployees: (1) those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. Only those employees who came within one or the other of these two categories are exempt.

When an establishment is exclusively engaged in performing operations specifically mentioned in section 7 (c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. Therefore, when an establishment is exclusively engaged in activities enumerated in the section, all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant. See also *Walling v. Bridgeman-Russell Co.*, F. Supp. (D. Minn. 1942).

On the other hand, the section 7 (c) exemptions are inapplicable to any employee working in a packing or processing plant whose duties relate to goods upon which "canning," "packing" or other operations de-

scribed in the section have been performed in another plant. Such an employee is neither performing the operations described in the section nor is his work in relation to such goods a necessary part of the exempt operations performed in the plant where he works. Moreover, where warehousemen, office help, or other employees work in a building which is on separate premises from that on which the packing or processing plant is located, they do not work in the place of employment where their employer engages in activities described in the section, and therefore such employees are not exempt. However, a warehouse located across the street or across a railroad right-of-way from the packing or processing establishment may be considered part of the same premises.

The purpose of section 7 (c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive. It therefore seems that the taking of the section 7 (c) exemptions during the dead season is contrary to the legislative intent, and in the opinion of the Administrator these exemptions may not be taken in regard to any employee during periods of the year in which the plant is not actually engaged in operations described in the section. The Division has consistently followed this interpretation since the effective date of the Act and it was recently sustained in *Heaburg v. Independent Oil Mill, Inc.*, 5 Wage Hour Rept. 777 (W. D. Tenn. 1942).

To summarize, the following general rules govern the application of the section 7 (c) exemptions:

If an employer does not himself carry on any of the operations specifically mentioned in section 7 (c), none of his employees come within the scope of the exemptions. If he does carry on such operations, the following two groups of employees are exempt:

(1) those who exclusively engage in the operations described in the section; and

(2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. When a plant exclusively engages in activities enumerated in the section, all of the employees of the operator of the plant who work solely in that plant are exempt. On the other hand, employees whose duties relate to goods upon which the described operations have been performed in another plant and employees working in a building which is on separate premises from that on which the exempt plant is located do not fall within either of the two groups of exempt employees and hence are not exempt. An employer may take the section 7 (c) exemptions only during periods in which he is actually engaged in performing operations described in the section.

B. Independent Contractors

The following general rule can be laid down in regard to the application of the section 7 (c) exemptions to employees of independent contractors:

Where an independent contractor is engaged by a packer or canner or other processor of agricultural commodities to perform operations in a packing or processing establishment, the employees of the independent contractor do not come within the section 7 (c) exemption unless

the independent contractor actually carries on an operation which falls within the scope of the terms "canning," "packing," "first processing," or any other operation described in section 7 (c) so as to be entitled to the exemption in his own right as a canner, packer, etc. If the contractor is so engaged, the exemption is applicable (1) to those of his employees who perform the operations described in section 7 (c), and (2) to those of his employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to those operations.

C. Particular Operations

It sometimes requires careful analysis to determine whether certain activities come within the scope of the operations specifically mentioned in section 7 (c). This release will deal with some of these problems which are of the most common occurrence and which involve the largest number of employees.

1. Labeling, Stamping, and Boxing of Canned Fresh Fruits and Vegetables

The Administrator is of the opinion that the labeling, stamping, and boxing of canned fresh fruits and vegetables, and other similar activities performed in connection with canned goods, are not "canning * * * perishable or seasonal fresh fruits or vegetables" unless these activities follow immediately after the hermetic sealing and cooling of the cans. Where the labeling, stamping, and boxing occur immediately after the hermetic sealing and cooling, the employees engaged in these activities are exempt, regardless of whether they are employed by the canner or by an independent contractor. If these operations are not performed immediately after the hermetic sealing

and cooling, they are not "canning" within the meaning of section 7 (c), and if the labeling, stamping, and boxing are performed by employees of an independent contractor, the employer is not thereby engaged in any of the operations described in the section and therefore none of his employees is exempt. If the labeling, stamping, and boxing do not follow immediately after the sealing of the cans but are performed during the active season by employees of the canner, the workers engaged in such operations are exempt, provided that these operations are conducted in those portions of the premises devoted by their employer to canning. Where an establishment is solely engaged in the canning of fresh fruits and vegetables, the labeling, stamping, and boxing of the canned goods during the active season by employees of the canner are exempt operations if performed in the cannery or in a warehouse located on the same premises as the cannery.

On the other hand, activities performed in a warehouse located on premises separate from the cannery are not conducted in the place of employment where the canning is done, and the exemption is inapplicable to all of the employees working in such a warehouse. Furthermore, employees working on the cannery premises who handle or work on goods canned in another cannery are not exempt.

2. Cooling of Fresh Fruits and Vegetables

It is the position of the Administrator that the following cooling operations are part of "packing perishable or seasonal fresh fruits or vegetables": The pre-cooling of the fresh fruits and vegetables in the packing plant by means of ice, water, or cold air; and the placing of layers of crushed ice in the crates with the fruits and vegetables. On the other hand, the placing of crushed ice on top of the filled crates after they

have been loaded into refrigerator cars for shipment; the blowing of water, cold air or ice over the packed fresh fruits and vegetables after they have been loaded in the cars; the recooling or bunker icing or reicing of refrigerator cars; and the cooling of empty cars before they are loaded with filled crates are not "packing" fruits and vegetables.

If cooling operations are of the type described above as constituting "packing," the employees engaged in such operations are exempt, whether they are employees of the packer or of an independent contractor. On the other hand, if the cooling activities are those described above as not constituting "packing" and are performed by an independent contractor, the employees engaged in such activities are not exempt. Where the cooling activities do not constitute "packing" but are performed by employees of the packer, such employees come within the scope of the exemption, provided that these activities are conducted solely in those portions of the premises devoted by their employer to packing. Thus, where an establishment is solely engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in the bunker icing or in cooling cars solely for use in shipping fresh fruits and vegetables packed in that establishment are exempt.

3. Assembling Box Shook Used in Packing Fresh Fruits and Vegetables

The Administrator is of the opinion that the assembling of box shook for use in packing fresh fruits and vegetables constitutes "packing" if performed in the packing house as part of a continuous operation with the packing of such fruits and vegetables. If so performed by employees of an independent contractor,

they are engaged in packing. The exemption also applies to employees of the packing house operator who, during the active season, assemble box shook solely in the portions of the premises devoted to packing, even if assembling the shook does not immediately precede the packing as part of a continuous operation. If the plant is used solely to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season solely in the packing plant or in a warehouse located on the same premises.

4. Manufacturing Cans, Ice and Boxes for Use in Canning and Packing Fresh Fruits and Vegetables

The manufacture of cans for use in canning fresh fruits and vegetables is not "canning," and, in the opinion of the Administrator, such manufacturing is too far removed to be considered "a necessary part" of canning. Accordingly, the manufacture of cans is not exempt, even though performed by a canner on the cannery premises solely for his use in canning fresh fruits or vegetables. For the same reasons, the manufacture of ice and of boxes and box shook for use in packing fresh fruits and vegetables is not exempt.

* * * * *

Insofar as Interpretative Bulletin No. 14, the general instructions issued for the canning and packing drives of 1941, release R-1561, and any other interpretations issued by the Division are inconsistent with the opinions expressed above, the prior interpretations should be regarded as hereby superseded. However, this press release is not intended to supersede the Division's Interpretative Bulletin No. 14. That bulletin remains in effect except as it has been or may be modified by official statements of the Division.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, a Corporation,
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, a Corporation,
Appellee.

On Appeal from the District Court of the United States for
the District of Hawaii.

**APPELLANT'S BRIEF ANSWERING BRIEF FOR THE
ADMINISTRATOR OF THE WAGE AND HOUR DI-
VISION, UNITED STATES DEPARTMENT OF
LABOR, AS AMICUS CURIAE.**

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**APPELLANT'S BRIEF ANSWERING BRIEF FOR THE
ADMINISTRATOR OF THE WAGE AND HOUR DI-
VISION, UNITED STATES DEPARTMENT OF
LABOR, AS AMICUS CURIAE.**

Pursuant to leave of Court, appellant respectfully sub-
mits this answer to the brief of the Administrator of the
Wage and Hour Division, United States Department of
Labor (hereinafter referred to as the Administrator), as
amicus curiae.

The Administrator's views must be evaluated in the light of certain settled principles. "As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency". *Bay Ridge Co. v. Aaron*, 334 U. S. 446, 461. The Administrator's views will be rejected if "legally untenable". *Jewell Ridge Coal Corp. v. U.M.W.A.*, 325 U. S. 161, 169. The weight to be given his interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control". *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. Such interpretations are persuasive, for example, where they represent the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new". *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 548. See also *Miller Hatcheries v. Boyer*, 131 F. (2d) 283 (C.C.A. 8), declining to overturn a long established administrative interpretation under the Act, and emphasizing that such interpretation was the Administrator's initial interpretation made soon after the Act went into effect and that it had been consistently followed; *Walling v. Halliburton Co.*, 331 U. S. 17, 25-26, declining to depart from a decision rendered under the Act five years before, and pointing out that employers had regulated their affairs on the faith of the earlier decision.

I.

NOTHING IN THE ADMINISTRATOR'S BRIEF DETRACTS FROM THE APPLICATION OF THE "AGRICULTURE" EXEMPTION IN THE ACT TO ALL EMPLOYEE APPELLEES.

A. The Administrator proposes untenable and impractical interpretations of the statutory definition of agriculture, and emphasizes irrelevant matters.

1. Our reply brief (pp. 5-6) has already shown the fallacy of the Administrator's statement (Br. p. 8) that appellant's processing mill is really the dominant element in its operations. Moreover, this argument of the Administrator, in which he places emphasis upon the object and purpose of an employer's operations in construing the phrase "incident to" in Section 3(f), represents a departure from his published interpretations of the meaning of that phrase.

An opinion rendered by the Administrator's attorneys, and consistently followed by the Administrator, stated that in determining whether practices are "incident to" farming operations, the tests to be considered are the following: (a) the number of employees working in the incidental practice as contrasted with the number working on the farm; (b) the number of man hours worked in the incidental practice as compared with the number worked on the farm; (c) the amount of the payroll for the incidental practice as compared with the amount of the farm payroll; (d) the extent if any to which the employees are interchanged between the incidental practice and farm work; and (e) the investment that the employer has in the incidental practice as compared with the investment in the farm. *1944-45 WHMan.*, pp. 592-593. See also ¶ 10, Interpretative Bulletin No. 14. These tests are satisfied here. Appellant's Br. pp. 25, 26-28 (particularly footnote 18 on p. 28).

2. The Administrator's contention (Br. p. 8) that appellant's business is a hybrid type, which has assumed the functions of manufacturer, carrier and farmer, betrays an acute lack of understanding of the usual farming opera-

tions of farmers in the United States, its Territories and possessions.

The particular activities in which appellant is engaged as shown by the stipulated facts (R. 129 et seq.) are the following: (i) Preparation of the soil; (ii) Construction of irrigation ditches, flumes, etc.; (iii) Hauling of supplies and laborers to and from the cane fields; (iv) Hauling of supplies from Honolulu to the plantation; (v) Planting; (vi) Ratooning; (vii) Cultivating; (viii) Weeding; (ix) Spraying herbicides and insecticides; (x) Fertilizing; (xi) Irrigating; (xii) Feeding and shoeing horses and mules; (xiii) Cutting of the cane; (xiv) Loading of the cane into narrow gauge railroad cars; (xv) Hauling of the cane to the mill; (xvi) Cleaning of the cane; (xvii) Preparing the perishable cane for market by processing it into raw sugar and molasses; (xviii) Loading raw sugar and molasses into rail cars for shipment; (xix) Repair of field machinery; (xx) Repair of hauling facilities; (xxi) Repair of processing machinery; (xxii) Storage of fertilizer, field machinery, herbicides, insecticides and other farm supplies; and (xxiii) Maintenance of records and performance of necessary clerical work.

Each and every one of these activities is functionally identical with the activities conducted by untold numbers of farmers. See Brief of American Farm Bureau Federation, *amicus curiae*, pp. 2-3, 6-8.

Thus it is misleading to designate appellant as a "carrier" and a "manufacturer", in addition to a farmer. Every farmer, as we have just shown, is a "carrier" in the sense that he transports and hauls his products from the fields to storage, to market, to a processor or to a carrier for transportation to market. The statutory definition plainly contemplates the farmer as a carrier in this sense, for it includes among the exempt practices of a farmer "delivery to storage or to market or to carriers for transportation to market". If he delivers, he transports or carries. And the legislative history of the exemption reviewed in our main brief (pp. 36, 84-86) repeatedly emphasizes the Congressional intent to exempt "all kinds of labor performed on a farm and all kinds of labor in connection with

delivering agricultural products to market" [Emphasis supplied]. Every farmer also is a carrier in the sense that he transports from one part of the farm to another agricultural supplies and agricultural equipment and in the further sense that he sends his trucks to a nearby town and hauls back necessary farm supplies and equipment. The Administrator himself in his Interpretative Bulletin No. 14 has recognized that these various "carrier" activities may be performed by a farmer and constitute part of farming. See ¶¶ 10(c), (d), (e) and (f) of the Bulletin.

Furthermore, every farmer is a "manufacturer" to the extent to which he transforms the product he grows into marketable condition. Many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. All of this is done preparatory to marketing. Brief of American Farm Bureau Federation, p. 7. Such a farmer is as much a farmer within the statute as a farmer who does less. The statute of course does not reduce "farmer" to the lowest common denominator of farming. The statutory definition of "agriculture" plainly contemplates the farmer as a "manufacturer" in this sense, for it includes, among the exempt practices of a farmer, "preparation for market". The legislative history of the exemption, reviewed in our main brief (pp. 34-36, 85), clearly reveals the Congressional purpose to exempt all work done on a farm "so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop." And the Administrator himself has recognized that a farmer is a "manufacturer" in this sense, for he has pointed out that the agricultural exemption may extend to the following operations among others when performed by a farmer: canning and packing fresh fruits and vegetables, canning and packing dairy products, ginning cotton, stemming tobacco and drying furs. Interpretative Bulletin No. 14, ¶ 10(b).¹

¹ See also the testimony of Administrator Walling before the Senate Committee on Education and Labor on S. 1349, 79th Cong., 1st Sess., page 236:

That all of the activities listed on p. 4, *supra*, are in fact commonplace, everyday activities of farmers, and exempt under Section 13(a)(6), is well illustrated by the case of *N.L.R.B. v. Campbell*, 159 F. (2d) 184 (C.C.A. 5). There, it was held that employees engaged in packing and preparing for market tomatoes grown by their employer on his farm were "agricultural laborers" within the meaning of the National Labor Relations Act and hence excluded from that Act's scope, which is much broader than the coverage of the Fair Labor Standards Act. *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U. S. 578, 579. The court said it was much persuaded by the fact that under the definitions of "agriculture" in the Fair Labor Standards Act and "agricultural labor" in the Social Security Act the same result would ensue (159 F. (2d) at 187):

"Congress, as well as this Court, has recognized that the packing and preparing of agricultural products for the market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces, *and so long as the operation of washing, packing, and preparing for market by the employees of a farmer is on that only which he has produced on his farm, it is a neces-*

"Senator ELLENDER. Well, then, let me put it this way—I desire to put in in the affirmative now and be more specific—should a large fruit grower have a processing plant of his own, and should he prepare his fruit for market on his own farm, then neither the present law nor the act we are considering would in any wise affect him?

"Mr. WALLING. I think that is correct.

"Senator ELLENDER. Suppose, on the other hand, that a few farmers, small farmers, got together and agreed to purchase machinery for processing their own fruit in the same manner as the large grower does—would they be covered by the proposed act, or would they be exempt?

"Mr. WALLING. I think they would be covered insofar as any produce is handled which is not raised on the particular farm. That is, the exemption goes to the farmer and his employees, but not to the handling of products by someone else, raised by someone else."

The distinction thus drawn by the Administrator has been consistently followed by him from the beginning. See Interpretative Bulletin No. 14, paragraph 10.

sary incident to farming and is agricultural labor. The wheat farmer must thresh his wheat; *the cane grower must cut his cane and make its juice into syrup*; the cotton grower must gin and bale his cotton; the citrus grower must pick and pack his oranges; and the tomato grower must do likewise. So long as these undertakings are in the preparation and packing by him for the market of that which he has grown on his farm, the labor necessary thereto is agricultural labor” [Emphasis supplied].

The court then rejected the argument that because the employer had over 1,000 acres planted in tomatoes and grew, packed and marketed many carloads in a season, it should be held to be engaged in an “industrial enterprise” in view of the size and nature of its operation. The court said (159 F. (2d) at 187) that “the exemption was not restricted to the forty-acres-and-a-mule farmer. It is not measured by the magnitude of his planting nor in the prolificacy of his harvest.” See also *Larson v. Ives Dairy Company*, 154 F. (2d) 701, 702 (C.C.A. 5); Appellant’s main br. pp. 15-17; Reply br. pp. 2-3.

3. Contrary to the Administrator’s contention (Br. p. 8) an activity performed by the farmer on his farm, which is otherwise an agricultural activity, is not converted into a non-agricultural activity simply because it is integrated with other activities. Every farmer’s activities are integrated in the sense that such activities are related, interdependent and have a common objective in the production and marketing of the farmer’s produce. The activities listed *supra*, p. 4, are integrated in that sense.

The chain store analogy offered by the Administrator is not apt (Br. p. 9). In the chain store case the central offices and warehouses are used to serve several retail stores which are located in different states. Here, however, the transportation and processing activities are performed on a single plantation and on the same plantation as the growing activities. Apart from this, the analogy is unsound, because of the difference in language of the two exemption provisions (Section 13(a)(2) and Section 13(a)(6)). The latter by statutory definition is much broader. Neither Section 13(a)(2) nor any other section of the Act defines the

word "retail"; nor does the Act exempt any practice incident to or in conjunction with the retail activity. But Congress did define "agriculture" in Section 3(f) and it did specifically exempt any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations.²

4. It is difficult to take seriously the Administrator's contention (Br. p. 9) that in order for a practice to be "in conjunction with" farming operations, it must occur on the crops being grown at the same time as they are being grown. Such a construction of Sec. 3(f) would render meaningless the examples of conjunctive practices specified in the section, to wit, preparation for market, delivery to market, delivery to storage and delivery to carriers for transportation to market. Patently the crop must be grown before it is prepared for market or delivered to storage or to market or to a carrier for transportation to market. The Administrator recognizes this fact himself for he states (Br. p. 9) that he has some difficulty with whether main line hauling of sugar cane to the mill is "in conjunction with" the growing activity. Yet such main line hauling also takes place in point of time subsequent to the growing activity.

To be given any effective meaning, the words "in conjunction with" must be construed as meaning in "association" or "connection" with the other farming activities and the Record herein shows that the growing, cane transportation and processing activities all occur at the same time albeit on different pieces of sugar cane. The growing, harvesting (including transportation) and processing of sugar cane constitute one continuous operation with only a few hours elapsing between the severing of the cane from its growing position in the fields and the loading of it into

² Just like the factor of integration of appellant's operations, so too the size, industrialization and technical and scientific nature of the appellant's operations, all of which are emphasized by the Administrator (Br. pp. 7-8, 11-12), are irrelevant to the question of whether appellant's employees are within the "agriculture" exemption. See our main brief, pp. 15-17 and cases cited therein; our reply brief, pp. 2-3.

cars, the transportation to the mill and the processing into raw sugar and molasses (R. 133, 136, 167, 212). It would be difficult to conceive of any situation that more aptly illustrated practices carried on "in conjunction with" the farming operations than the cane transportation and processing activities here involved.

B. The Administrator has misinterpreted the cases arising in Puerto Rico which involved the "agriculture" exemption in the Act.

1. We have shown that these decisions either support our contentions or are clearly distinguishable from the case at bar (Appellant's Br. pp. 43-47). In any event the cases are not in point because of the clear differences between sugar production in Puerto Rico and in Hawaii.

Under the Puerto Rican system, the "centrale", or sugar mill, is owned by individuals, a partnership or a corporation and grinds sugar cane grown on several separate farms which are (1) farms owned and operated by the centrale, and (2) farms owned and operated by independent growers known as colonos who are too small to afford their own mill. The mill may or may not be located on one of the farms whose cane it processes. The centrale also operates a railroad transportation system which hauls to the mill both the sugar cane grown by the centrale on all its farms and also the sugar cane grown by the colonos on their farms. The centrale operates its mill and transportation system as a single enterprise with supervision, employees and a payroll separate from the farms which it operates. The farms in turn have their separate supervision, employees and payroll. As pointed out in the Deputy Administrator's letter to Mr. James Marshall, referred to *infra*, p. 20, (see also Appendix "B" herein, pp. 47-48, *infra*), such a farm through employees under its own supervision and on its own payroll may transport cane to the centrale's mill. More usually, however, each colono has his own portable tracks on his farm, on which he hauls cane to a "concentration point" at the edge of his farm, where his cane is unloaded and delivered to the centrale.

The centrale then reloads the cane on railroad cars on its main line and hauls it to the mill. Where the cane comes from the centrale's own farm or farms, the same system is followed except that, of course, the centrale itself through personnel working on the farm performs all portable track operations.³

As the foregoing facts show, the Puerto Rican facts are distinguishable from those in the instant case in the following important respects: (i) In Puerto Rico the main line transportation facilities and mill involved are not incident to or integrated with any single farming operation by one owner-farmer. *Rather they serve many farmers and many farms.* Here, however, appellant transports and grinds only its own cane (R. 159, 184) and all such cane, while grown in different fields,⁴ is grown by the one farm (Appellant's Reply Brief, p. 4). See pp. 5-6, footnote 1, *supra*. (ii) In Puerto Rico the railroad transportation system is not located on any single farm as it is in the instant case (R. 159). (iii) In Puerto Rico the cane, after being cut on a farm, is hauled to a concentration point at the edge of the farm where it is unloaded and delivered to the transportation system of the centrale. The centrale then reloads the cane on railroad cars and hauls same to the mill. *Here, however, as the appellees concede* (Br. p. 31) there is no concentration point at which cane is collected and unloaded. Cane cut in the fields is loaded into rail cars and moved in one con-

³ These facts as to the centrale system are gathered from the District Court's decision in *Bowie v. Claiborne*, (D. P. R. 1939) 1 Labor Cases, ¶ 18,443 and the First Circuit's decisions in *Bowie v. Gonzalez*, 117 F. (2d) 11 and *Calaf v. Gonzalez*, 127 F. (2d) 934.

⁴ The Administrator repeatedly confuses "farm" which includes a number of fields with "field". See, for example, his statement (Br. p. 15) that in *Calaf v. Gonzalez*, 127 F. (2d) 934, the locomotives and cars moved from the mill to the "fields" and back. An examination of the facts as stated by the court in that case will show that the locomotives and cars moved from the mill to the several separate "farms" and back.

tinuous operation over portable tracks and permanent tracks directly to the mill (R. 157, 160, 161-162). There is no common pile or piles of cane in any field and no cane is ever piled at the edge of the field (R. 363).⁵

2. The Administrator's emphasis of the Puerto Rican cases, as well as his emphasis of the number of locomotives and railroad cars which appellant uses together with the mileage of its permanent tracks (Br. pp. 7-8, 10-17), shows that the Administrator regards the medium of transportation used by appellant, i.e. railroad, as the basis for denying exemption to the transportation operation. But type of vehicle used by the farmer in hauling his crops to a storage place, a processing plant or any market should make no difference. Brief for American Farm Bureau, p. 8. A farmer, consistent with his means, will use that mode of transportation best suited for his type of farming. In any event, permanent railroad transportation is not the only means of transportation used by Hawaiian sugar plantations to "gather in" the sugar crops. Other methods used are flumes, tractors pulling wagon trains, cableways and motortrucks with the general trend toward large motor trucks.⁶ It makes no economic sense to take the position that a Hawaiian plantation transporting its cane by rail is non-exempt in the transportation operation, while one

⁵ These facts (see also Appellant's main br. p. 45, footnote 31) also refute the Administrator's contention (Br. p. 10) that the main line hauling in the case at bar is not part of "harvesting" since the gathering in of the crops is completed in the fields prior to transportation on the permanent tracks. It is as absurd for the Administrator to assert that the gathering in of the sugar cane is completed in the fields on which it is grown as it would be to assert that the cutting of stock feed in the fields completes the gathering in of such stock feed even though it is then taken to storage in a silo on the farm.

⁶ Bulletin No. 926, U. S. Dept. of Labor, p. 45. The pertinent excerpt from such Bulletin is set forth in Appendix "A" herein, p. 37, *infra*.

transporting its cane by truck is exempt. Yet that would appear to be the Administrator's position.⁷

3. The Administrator, relying upon *Calaf v. Gonzalez*, 127 F. (2d) 934 (Br. pp. 15-16, 21), stresses the following factors in determining whether the exemption applies to transportation employees: whether the workers are employed by the mill and have their names on the mill payroll; whether the locomotives and cars have their depot at the mill and move back and forth from the mill to the farms; whether the persons engaged in the transportation of sugar cane engage in agricultural work; and whether the employees are supervised from and report to the mill.

These factors, while they may have meaning in Puerto Rico, are inapposite here. In Puerto Rico, as we have seen (and this was true in the *Calaf* case), the cane processed at the mill is that grown on several separate farms. One main line transportation system is used to transport cane from all such farms to the mill. Consequently the foregoing factors may well have a bearing upon the question of whether transportation is incident to farming or incident to milling. In the case at bar, however, there is but one farmer and one farm and a transportation system confined exclusively to that farm. There is thus but one payroll,⁸

⁷ It is not clear from his brief what position the Administrator would take as to rail transportation operations of those few Hawaiian plantations which do not operate mills but transport their cane by rail to mills of other plantations (R. 325-326; Appellees' Ex. No. 4 in evidence). To be consistent the Administrator must deny exemption even to the rail transportation operations under those circumstances. This pointedly demonstrates the absurdity of his position.

⁸ The inference drawn by the Administrator (Br. p. 16) from the record (R. 116) that appellant's employees engaged in processing and transportation are carried on payrolls other than the one used for field employees is unwarranted. The reasoning employed by the Administrator would lead equally to the untenable conclusion that appellant's employees engaged in cultivating are carried on a different payroll from those engaged in harvesting or in irrigation water supply or in cleaning and weeding or in any other agricultural activity.

one place at which to report for work, one place from which to supervise the employees (R. 137-138) and one place to keep the locomotives and cars. The foregoing factors thus can have no application here.

4. In discussing the Puerto Rican cases the Administrator (Br. p. 12, footnote 4) refers to his annual reports and admits that he recognized therein the fact that Section 3(f) is broad enough to include employees engaged in activities not primarily agriculture. For example he admits the building of a grain silo on a farm even if constructed by a building contractor would be exempt. Nothing in the statutory definition suggests that the construction of the silo by the building contractor is more incidental to the farmer's operations than the hauling by the farmer of his crops to the processing plant on the farm.⁹

5. The Administrator's discussion of *Vives v. Serralles*, 145 F. (2d) 552, ignores the fact that the *Vives* case involved two groups of transportation employees, both of which were held exempt. The second group worked on the farm where the mill was located and hauled the cane from the fields on the farm to the mill on the farm. It is misleading, therefore, for the Administrator to state without qualification (Br. pp. 14-15, 17) that in the *Vives* case the court fixed the point at which the portable tracks met the permanent tracks as the dividing line between activities exempt under Section 13(a)(6) and activities not so exempt. Insofar as the second group of employees was concerned, such point did not in the court's opinion mark the end of the harvesting operation, but rather the harvesting operation continued up to the point of the mill. And as the

⁹ If such construction by a building contractor is exempt it would seem to follow that the construction by the farmer of irrigation flumes and pipe for use in the operation of his farm is likewise exempt. While such latter activity was held non-exempt by the court below (Appellant's Br. p. 19) the Administrator's reasoning on the silo construction case would appear to indicate that he regards this holding as wrong and that in his opinion the construction by appellant of flumes and pipes for irrigation is exempt.

court said, paragraph 5(a) of the Administrator's Interpretative Bulletin No. 14 expresses the same view.

Contrary to the Administrator's contention (Br. pp. 16-17), there is no inconsistency between transportation on permanent railroad lines and the location of such transportation system on the farm. While we agree that cane cannot be grown on the "right of way" occupied by appellant's main line railroad tracks any more than it can be grown on the ground where a barn is built, such tracks are as much located on the "farm" as the field roads on which agricultural laborers, supplies and equipment are hauled to and from the fields.

The words "on a farm" as used in Section 3(f) must mean the land or other place, under the ownership or control of the grower, where the growing operation and other operations enumerated in Section 3(f) take place (Appellant's Reply brief, p. 4). It cannot mean simply a cane growing "field". "Farm" is defined in Webster's New International Dictionary (2d ed.), Unabridged, (1945), p. 919 as

" . . . 6 . . . a piece of land held under lease for cultivation; hence, *any tract of land (whether consisting of one or more parcels)* devoted to agricultural purposes, generally under the management of a tenant or the owner; *any parcel or group of parcels of land* cultivated as a unit . . . " [Emphasis supplied].

See also Brief by American Farm Bureau Federation, p. 6, for general meaning of "farm". "In the case of the Territory of Hawaii, a farm means all land which is farmed by a producer, or group of producers, as a single farming unit, with cropping practices, work stock, equipment, labor, and management substantially separate from that of any other such unit". *Determination of a Farm, etc., for the Territory of Hawaii*, made by the Secretary of Agriculture under the Sugar Act of 1937 (Code of Federal Regulations, Title 7, Ch. VIII, Pt. 802, § 802.30 (2 F. R. 2108)). Thus, in this case the farm includes the growing fields, the buildings and yard area, the wooded plots, the field roads, etc. (R. 65, 135-136, 256).

In *Calaf v. Gonzales*, 127 F. (2d) 934, 937-938, the court stated that the transportation operation would be exempt "if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm". It made this statement despite the fact that it had before it a permanent main line railroad transportation system. The Administrator concedes also (Br. p. 16) that if the heart of the main line transportation system and the situs of the employment of the workers are located on the farm, the exemption applies. That is precisely the case here. Furthermore, in the *Vives* case where the Administrator concedes (Br. p. 16) the heart of the transportation system was on the farm, it must be remembered that the second group of employees held exempt transported the cane from the fields to the mill. Nothing in the court's opinion intimates that the fact that they used a medium, other than a railroad, to effect such transportation was the controlling factor that caused the "heart" of the transportation system to be located on the farm.

C. The wage determinations under the Sugar Act of 1937, relied upon by the Administrator, are irrelevant. If relevant, however, appellant's main line transportation employees are exempt from the Fair Labor Standards Act, since such wage determinations under the Sugar Act have been made with respect to them.

The Administrator emphasizes (Br. p. 15) as the main reason for the court's alleged holding in the *Vives* case the fact that the wages of laborers in the field performing operations up to the concentration point were regulated by the Secretary of Agriculture under the Sugar Act of 1937 (50 Stat. 903; 7 U. S. C. §§ 1100, *et seq.*). The need for a clear dividing line between the coverage of the two acts, the Administrator adds, suggested the concentration point as a useful point of cleavage.

1. The wage determinations of the Secretary of Agriculture under the Sugar Act are not relevant. They are made under a statute which authorizes wage determinations only for employees engaged in "production, cultivation, or harvesting". While the quoted words appear also in the defi-

nition of "agriculture" in the Fair Labor Standards Act, they form but a small part of such definition. As the Second Circuit said in *Damutz v. Pinchbeck*, 158 F. (2d) 882, 883, cited in our main brief p. 16, "differing definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one".

2. If, however, the Secretary of Agriculture's wage regulations under the Sugar Act are decisive, appellant's employees engaged in the main line transportation are clearly exempt under Section 13(a)(6) for their wages have been regulated for years under the Sugar Act. For example, in the wage determinations for 1941, 1942, 1943 and 1944, the Secretary of Agriculture (or the War Food Administrator) fixed wages for the following classes of employees, among others, in Hawaii: railroad brakemen, railroad engineers, railroad firemen and conductors. Code of Federal Regulations, Title 7, Ch. VIII, Pt. 802, § 802.34d (6 F. R. 611) (1941); § 802.34e (7 F. R. 3053) (1942); § 802.34f (8 F. R. 8780) (1943); § 802.34g (9 F. R. 869) (1944). All these employees are engaged in main line transportation (R. 162-163). Thus the Secretary of Agriculture has also recognized the distinction explained *supra* pp. 9-11, between sugar cane production in Puerto Rico and that in Hawaii. In Puerto Rico he has made wage determinations only for employees engaged in work up to the concentration point, but in Hawaii his wage determinations have extended as well to main line transportation employees. His most recent wage determination for Hawaii points out that from 1938 to 1944, the wage determinations for Hawaii applied to specified harvest and non-harvest tasks. 13 F. R. 212, 213 (Jan. 16, 1948 issue of Federal Register). Thereafter in view of the existence of collective bargaining agreements, he merely determined that the wage rates should be those agreed upon between producer and laborer without designation of specified tasks. See, for example, the most recent wage determination for Hawaii referred to *supra*. There is nothing to indicate, however, that he ever changed his view as to which operations on Hawaiian plantations constitute "production, cultivation, or harvesting of . . .

sugar cane'', the activities specified in the Sugar Act as those for which the Secretary is to determine fair and reasonable wage rates. See Sec. 301(b) of Sugar Act of 1937, *supra*, p. 15, and Sec. 301(c)(1) of the Sugar Act of 1948 (61 Stat. 929; 7 U. S. C. Secs. 1100 et seq.)

D. The broad and sweeping exemptions granted by the Act to "agriculture" and the agricultural processing industries show clearly the legislative intent to exempt all of appellant's operations here involved.

In order that the court may fully understand the solicitude of Congress toward "agriculture" and industries engaged in processing agricultural commodities, we should like to review the treatment accorded "agriculture" and agricultural processing industries in the Act. We find first that in Sec. 13(a)(6) Congress granted a sweeping exemption from both the wage and hour provisions of the Act to all employees "employed in agriculture". Lest there be any mistake as to how far-reaching the exemption was intended to be, a broad and all-inclusive definition of the term "agriculture" was written into Section 3(f) (Appellant's Br. pp. 33-40, 81-87). The first thing included in the definition is "farming in all its branches". There then follows an enumeration (not intended to be exhaustive) of a number of farming operations, to wit, "cultivation and tillage of the soil", "dairying", "production, cultivation, growing, and harvesting of any agricultural . . . commodities", and "raising of livestock, bees, fur-bearing animals, or poultry". Not being satisfied that, as it intended, it had exhausted the scope of agricultural operations, Congress concluded the definition with the catch-all clause "and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". The English language could not more clearly evince the plain intent of Congress to make this definition as broad as possible. The definition, of course, applies to sugar cane as well as to any other agricultural commodity.

But Congress was not satisfied with exempting simply agriculture as thus broadly defined. It desired as well to exempt from overtime requirements either for the entire year or, in the case of seasonal industries for 14 workweeks per year, the processing of *all* agricultural commodities as they come from the farm. To accomplish this result, Section 7(c) was written into the Act.¹⁰ The Administrator in his Bulletin No. 14, ¶ 14, has aptly summarized the effect of Section 7(c) as follows:

“Thus, it will be observed that this section grants the following exemptions:

“1. A complete exemption from the hour provisions to employees ‘in any place of employment’ where their employer is engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products.

“2. The same complete exemption where the employer is engaged in the ginning and compressing of cotton, or in the processing of cotton seed.

“3. The same *complete* exemption where the employer is engaged in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap into sugar (but not refined sugar) or into syrup.

“4. An exemption, for a period aggregating not more than 14 workweeks in any calendar year, from the hour provisions to employees ‘in any place of employment, where their employer is engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables.

“5. The same *partial* exemption from the hour provisions where the employer is engaged in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations.

“6. The same *partial* exemption from the hour provisions where the employer is engaged in handling, slaughtering, or dressing poultry or livestock” [Emphasis supplied]. 1944-45 *WHMan.* p. 566.

¹⁰ While we are anticipating somewhat in discussing Section 7(c) at this point in our Argument, such discussion is necessary so that the Court may comprehend how thorough Congress was in accord- ing a total exemption from the Act’s requirements to sugar opera- tions like those of appellant.

No other groups in the American economy were given the same widespread exemptions in the Act as the "agriculture" and agricultural processing groups. So far as sugar cane production and processing are concerned, Section 13 (a)(6) manifests a clear intent to exempt from both the wage and overtime requirements employees engaged in all operations performed by the sugar cane grower or on his farm in connection with growing and marketing his sugar cane crops. As the Supreme Court has said, "employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 612. Section 7(e) manifests a clear intent to exempt throughout the year all processing operations performed upon sugar cane necessary to transform same into raw sugar or syrup, whether such processing is done by the grower or by some independent processor. In the face of such intent of Congress, so fully and plainly expressed in the statutory language, it is preposterous for the Administrator to single out particular segments of the appellant's operations and to stamp them non-exempt. No basis exists, for example, to hold that the appellant's cane growing operations and its cane processing operations are exempt but the operation of transporting the sugar cane from its fields on its farm to its mill on its farm are not exempt, even though such transporting operation is integrally a part of the growing and processing operations. Such a construction of the law flouts the legislative purpose expressed in the Act.

E. The interpretations as to the transportation of sugar cane announced in the Administrator's brief represent a clear departure from previous interpretations long followed by the Administrator and never publicly modified. Accordingly, and since the interpretations here advanced are in any event legally untenable, they are entitled to no weight.

The Administrator states (Br. p. 17) that the interpretations he urges in his brief have long been and long remained his official position. This statement is woefully incorrect.

1. Whenever the Administrator, because of a judicial decision, has modified a previously announced interpretation as expressed in one of his interpretative bulletins, he has done so by a re-publication of the bulletin or by a press release bringing the modification to the attention of employers, employees and others. For example, after the decision in *Bowie v. Gonzalez*, 117 F. (2d) 11, the Administrator issued a press release stating that in the light of that decision he was of the view, contrary to the position taken in Bulletin No. 14, that the Section 13(a)(6) exemption does not apply to sugar mill employees even though they grind only cane grown by the sugar mill owner in his fields. Neither after the *Bowie* decision nor that in *Calaf v. Gonzalez*, 127 F. (2d) 934, which the Administrator now relies upon so heavily, nor at any other time did the Administrator ever advise sugar plantations or mills or their employees or the public generally that he was changing the opinion expressed in ¶ 10(f) of Bulletin No. 14, issued in August, 1939, that hauling by the mill operator of his own grown cane to his mill constitutes "agriculture".

2. The Administrator seeks to show that he had nonetheless changed his interpretation on sugar cane transportation after the *Calaf* decision by referring to three documents (Br. pp. 19-21): (i) his release, G-322, dated May 20, 1943, published incident to his approval of a wage order for the Sugar and Related Products Industry; (ii) a letter dated November 26, 1942, written by William B. Grogan, acting for the Administrator, to Mr. Paul Guillot of Paincourtville, Louisiana; and (iii) a letter dated October 9, 1946, from the Deputy Administrator to Mr. James Marshall, Director of the Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture.

The Administrator admits (Br. p. 21, footnote 5) that the two letters above cited were never made the subject of a press release nor were they printed in the standard labor law reporting services. The situation is comparable to that of the Administrator's preparing a memorandum concerning his change of position and then proceeding to file such memorandum in his desk drawer or in his files and never advising the public about it. To accord weight to the

changed position under such circumstances would offend basic principles of elementary justice.

Apart from this, neither release G-322 nor the above two letters in fact represented any change in the position taken in ¶ 10(f) of Interpretative Bulletin No. 14. We have set forth in Appendix "B" herein, pp. 37-38, *infra*, the pertinent part of the text of G-322. As shown therein the Administrator affirmed ¶¶ 1-13 of Interpretative Bulletin No. 14 *in toto*, and that includes ¶ 10(f). His statement in G-322, that whether employees engaged in transporting sugar cane from a farm to a mill are to be regarded as employed in agriculture is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law, is hardly the equivalent of the adoption by him of the principle of law which he alleges was laid down in the *Calaf* case. See also Appendix "B" herein, pp. 38-42, *infra*, where we set forth excerpts from the Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943. Such excerpts contain the discussions pertaining to the application of the "agriculture" exemption to cane transportation, which preceded the issuance of the wage order. They too show a reaffirmation by the Administrator of Interpretative Bulletin No. 14, including ¶ 10(f) thereof.

The letter to Mr. Guillot was in response to one addressed by Mr. Guillot to the Administrator under date of September 29, 1942. The full exchange of correspondence is set forth in Appendix "B" herein, pp. 42-46, *infra*. Mr. Guillot raised a question about sugar cane transportation and processing operations in Louisiana, where, *as his letter shows, the mill operators do not transport simply the cane they grow themselves but also transport cane grown by other farmers* which is processed at the mill. See too Brief of American Sugar Cane League of U. S. A., Inc. as *amicus curiae* herein, pp. 2, 3-4. Moreover, since the Guillot letter was dated November 26, 1942, and preceded G-322 (which reaffirmed ¶¶ 1-13 of Interpretative Bulletin No. 14), nothing said in that letter can be taken to detract from the Administrator's subsequent reaffirmation of such paragraphs. But if the letter does represent a change in the position asserted in ¶ 10(f) of the Bulletin, the subsequent shift back

to ¶ 10(f), as revealed by G-322, shows that the Administrator's final position was that stated in the Bulletin.

The letter to Mr. Marshall (Appendix "B" herein, pp. 46-49, *infra*) dealt with transportation in Puerto Rico and alluded to the centrale system. It was that system to which the Deputy Administrator referred when he wrote that "the mere fact that the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the farm to the mill is 'incident to farming' and therefore exempt under Section 13(a)(6)". Such opinion is irrelevant here where there is only one farm, one farmer and the transportation system operated by that farmer is located on that farm and serves only that farmer and that farm. Moreover, the Marshall letter admits that hauling cane under the circumstances of this case is exempt, for it states:

"Truck drivers transporting cane on a farm as an incident to the farming operations on that farm would, of course, be exempt. However, since the truck drivers deliver the cane to a mill, I assume that this transportation involves working off the farm, in which case the transportation of the sugarcane would be exempt under Section 13(a)(6) only if performed by employees of the farmer, as an incident to the farming operations of the farmer. In the ordinary case, an employee of a farmer who is employed by the farmer to haul the farmer's own cane to a mill or factory would be exempt under section 13(a)(6)"

3. The Administrator never until this lawsuit changed his position as expressed in ¶ 10(f) of the Bulletin. He never enforced any other rule in Hawaii, although he has maintained an office in Hawaii since the beginning of his enforcement activity under the Act and has conducted frequent inspections on Hawaiian sugar plantations to check on compliance with the Act. The plantations generally, including appellant's, have always treated their main line transportation employees as exempt under Section 13(a)(6) and the Administrator has never even as much as hinted that in doing so they were violating the Act. Even the appellee union, which frequently consulted the local

wage-hour office on matters pertaining to compliance with the Act by the sugar plantations, makes no mention in its brief herein of any changed ruling on sugar cane transportation by the Administrator. On the contrary it asks simply that the ruling in ¶ 10(f) of Interpretative Bulletin No. 14 be disregarded (Appellees' Br. p. 21).

4. But even assuming that the Administrator in fact changed his opinion as expressed in ¶ 10(f) of his Bulletin and ruled otherwise on cane transportation, such changed opinion is entitled to no weight. *Supra*, p. 2. The interpretations, which the Administrator seeks to apply here, are not as we have seen his initial interpretations made soon after the Act went into effect and consistently followed, but rather some newly devised interpretations contrived to defeat appellant's position under the circumstances herein.

F. The Administrator's interpretation on main line transportation is inconsistent with his interpretation on the hauling of agricultural supplies, equipment and laborers to and from the fields. It is also inconsistent with his interpretations concerning many of the other important activities engaged in by appellant's employees.

It is conceded by the Administrator in Interpretative Bulletin No. 14, ¶ 10(f) that the hauling of supplies, equipment and laborers by the farmer by truck to and from the fields is exempt under "agriculture". The Administrator does not in his brief indicate that he has changed this interpretation in any way, despite the fact that the court below held such hauling non-exempt (R. 441-442, 444; appellant's main Br. pp. 11-12, 17, 18). The Act could not have contemplated any distinction in the treatment of the hauling of cane from the fields and the hauling of supplies, equipment and laborers to the fields when performed by the farmer in connection with his own operations. It should also be noted that unlike transportation of the raw produce from the fields to the processing plant or to storage or to market or to carriers for transportation to market, which is specifically mentioned in the "agriculture" definition as

an exempt activity, there is no such mention of the hauling of supplies and equipment to and from the fields.¹¹

Furthermore as shown by our main brief (pp. 18-19), the District Court also held non-exempt under Section 13(a)(6) the following activities, among others, performed by the appellee employees: (a) Hauling by truck plantation supplies and equipment from Honolulu to the plantation; (b) Maintenance, repair and operation of appellant's trucks and field roads on the farm; (c) Repair and overhauling of agricultural equipment; (d) Shoeing of horses and mules; (e) Storage and handling of farm supplies and equipment; (f) Construction and repair of irrigation facilities and equipment. For the reasons we have heretofore advanced (see also the brief herein of the American Farm Bureau Federation, pp. 2-3, 6-8) we submit that all such activities are exempt. The Administrator also has held such activities to be exempt when performed by the farmer or on the farm (Appellant's main Br. p. 50; Brief of American Farm Bureau Federation, pp. 18-19). The Administrator's failure to acknowledge in his brief that these activities are exempt must be attributed to a desire to avoid the embarrassment of the necessary inconsistency between such opinion and his presently asserted opinion that the main line transportation operations of appellant are not exempt. Such transportation, under any reasoning, is as much entitled to the exemption as the activities above listed.

¹¹ See too *Bowie v. Claiborne*, (D. P. R. 1939) 1 Labor Cases ¶ 18,443, holding exempt under Section 13(a)(6) employees hauling supplies and equipment from places off the farm to the farm. This is the decision of the District Court of Puerto Rico which, as affirmed by the First Circuit under the name of *Bowie v. Gonzalez*, is so heavily relied upon by appellees and the Administrator (Appellees' Br. pp. 23-25 and Administrator's Br. pp. 10-12).

II.

NOTHING IN THE ADMINISTRATOR'S BRIEF DETRACTS FROM THE APPLICATION OF THE SEC. 7(c) EXEMPTION TO ALL EMPLOYEE APPELLEES WHO ARE ENGAGED IN THE HAULING OF SUGAR CANE FROM THE FIELDS TO THE MILL, THE PROCESSING OF SUGAR CANE INTO RAW SUGAR, AND THEIR INCIDENTAL AND FUNCTIONALLY NECESSARY AND INDISPENSABLE OPERATIONS.

A. All such employees are engaged in the processing of sugar cane into raw sugar and work in the "place of employment" where the appellant is engaged in such processing.

The stipulated facts (R. 129-256) reveal beyond question that the appellant simply produces sugar cane and processes such sugar cane into raw sugar and molasses. The parties stipulated that—

“the business of the Plantation has been and continues to be the growing, cultivating and harvesting of sugar cane on lands owned or leased by the Plantation; the processing of such sugar cane into raw sugar and molasses; the bagging, loading and shipping of the raw sugar to refineries situated in the continental United States; and the loading and shipping of molasses in bulk to continental United States, all of which is hereinafter described” (R. 131).

As a matter of common sense, then, all appellant's activities constitute either sugar cane production exempt under Sec. 13(a)(6) or sugar cane processing exempt under Sec. 7(c). And all of the activities exempt under Sec. 7(c) take place in the same “place of employment” where the appellant processes sugar cane into raw sugar.¹² The Adminis-

¹² Contrary to the Administrator's statement, (Br. p. 25) nowhere do we contend that the “place of employment” in the instant case is the entire plantation. We contend simply that the “place of employment” embraces not only the mill building but also all other areas on the plantation where operations necessary and indispensable to cane processing are carried on. See our main br. pp. 53-55, 60-64, 89-92.

trator's assertions (Br. pp. 24, 25-27) that a number of appellant's employees are engaged in activities not closely related either to sugar cane production or processing and work in departments, areas or buildings not devoted to the exempt operations, are directly in conflict with the Record.

B. The Sec. 7(c) exemption applies to appellant's employees engaged in cane transportation.

1. The train crews who operate the trains herein merely deliver the loaded cane cars to the mill and pick up the empty cane cars. The unloading of the cane cars, their movement into the unloading platform at the mill, and their movement away from the mill are handled by employees in the cleaning plant of the mill (R. 161-163, 166, 168-169, 171, 234, 236-237). The Administrator's brief seeks to create a wholly novel interpretation of the Sec. 7(c) exemption as regards transportation employees, by excluding from the exemption those transportation employees not performing some duties at the mill such as unloading of sugar cane (Administrator's Br. pp. 23, 30). The Administrator has never heretofore sought to enforce the Act on any such basis. Under the Administrator's newly created limitation, no transportation employees of appellant would be exempt.

This result stands out in striking contrast to the fact that in the sugar cases arising in Puerto Rico it was held that transportation is "incident to milling". It was assumed in those cases, therefore, that such transportation was exempt under Sec. 7(c).¹³ *The Administrator's brief does not explain why the cases arising in Puerto Rico should be regarded as supporting his Sec. 13(a)(6) conclusions, because transportation is "incident to milling" (Br. pp. 10, 13-17), and nevertheless that such cases do not support appellant's contention that transportation is exempt under Sec. 7(c).*

The Puerto Rican cases, it will be noted, involved, among others, transportation employees who did no work at the mill. In the *Bowie* case, *supra*. p. 10, the employees involved included those engaged in the repair and mainte-

¹³ The court below recognized that in denying the Sec. 7(c) exemption to employees engaged in transportation work, its holding was contrary to that of the Puerto Rican cases (R. 425).

nance of the transportation facilities. And in the *Calaf* case, *supra*, p. 10, the employees who were held to be engaged in work "incident to milling" included those engaged in the following types of work: construction and repair of rolling stock, fireman, brakeman on the locomotive, splitting wood for engines, repairing main railroad line, signalling at grade crossings, and repairing of railroad carts. If employees engaged in such work were exempt under Sec. 7(c), so are the cane transportation employees in the instant case.

2. The Administrator repeatedly suggests that in order to enjoy any Sec. 7(c) exemption, the employee must actually work "in" the place of employment where the processing operation takes place (Br. pp. 25, 26, 28, 30-31). In this connection, he quotes (Br. pp. 28, 29) excerpts from his release R-1892 dated January, 1943. But when this release is examined in full (Administrator's Br. pp. 42 *et seq.*) it is found that this is not the Administrator's position at all, for in the release he announces without qualification that the Section 7(c) exemption applies to

"those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant" (Administrator's Br. p. 44).

There is no limitation here that such transportation employees must do some work "in" the processing plant, such as unloading or loading, in order to enjoy the exemption. Thus the Administrator's own release, R-1892, upon which he now relies, does not support him but clearly supports appellant's contentions.

Nor does R-1892 stand alone among the Administrator's interpretations. His other interpretations plainly include in the exemption many types of employment not located "in" the place where the processing occurs. See our main brief, pp. 89-92. Indeed the Administrator has held exempt under the Sec. 7(c) sugar cane processing exemption employees of a sugar mill engaged in hauling raw sugar from

the mill to a warehouse located seven miles away. 1944-45 *WHMan.* p. 609. And, as pointed out in our main brief (pp. 61-62), the Administrator has gone so far as to declare that handling, labeling and casing operations in a cannery storage place may be considered as performed in the same "place of employment" as the canning operation, even if the storage place is in a county contiguous to that in which the cannery building itself is located. And the Wage-Hour Division has also ruled that "truck drivers who carry raw materials to the establishment, or who transport away from the establishment goods upon which exempt operations have been performed, may be considered as working in the "place of employment" within the meaning of this section [Sec. 7(c)]". See letter written by Mr. William Grogan for the Administrator to Mr. Paul Guillot, dated November 26, 1942, quoted in part in the Administrator's brief, p. 20 and set forth in full in Appendix "B" herein, pp. 43-46, *infra*. We are at a loss to understand how, after issuing such rulings, the Administrator can now for the first time, in the appellate stage of this litigation, seek to obtain the restrictive "place of employment" interpretation urged in his brief.

C. The cases cited by the Administrator do not support his presently asserted position on Sec. 7(c).

The cases cited by the Administrator (Br. pp. 27-28) all relate either to the Sec. 7(c) exemption for the first processing of milk, whey, skimmed milk or cream into dairy products, or for handling, slaughtering or dressing poultry or livestock. Furthermore, in each of the cases cited the employer not only was performing the operations described in the exemption language of Sec. 7(c), but also was performing other operations that such exemption language does not describe. For example, in *Walling v. Bridgeman-Russell*, (D. Minn. 1942) 6 Labor Cases ¶ 61,422, the employer at his place of business not only was engaged in the first processing of milk and cream into dairy products, but he was also wholesaling eggs, fountain supplies, frosted foods, meats and other commodities and he was making ice cream mix and ice cream. Also he was cutting, printing and packaging butter made in other places of employment. Again in

Fleming v. Swift, 41 F. Supp. 825 (N. D. Ill. 1941) the employer not only was handling, slaughtering and dressing livestock but was also engaged in meat-curing, sausage-making, and manufacture of dog food, soap, glue and industrial oils. Accordingly the exemption in those cases was limited to those departments of the employer's business engaged in the operations described in Sec. 7(c).

In the case at bar, however, aside from the growing of cane, the appellant is engaged exclusively in an operation which 7(c) exempts; namely the processing of sugar cane into raw sugar. The Administrator himself has recognized that this distinction exists among the different plants subject to Sec. 7(c) exemptions and that under the circumstances where an employer is engaged exclusively in an operation which 7(c) exempts, the exemption applies to all activities functionally necessary and indispensable to the exempt operation. See p. 89 of our main brief, setting forth an opinion of the Administrator, to which he fails to make any reference in his brief. See also the cases discussed in our main brief (pp. 57-59 and footnote 41 on p. 59) which are to the same effect. In fact the very release (R-1892), which the Administrator emphasizes, recognizes this same distinction (Administrator's br. pp. 44-45, 46), which is ignored in the Administrator's brief.

D. The Section 7(c) exemption applies to the appellant's service shop employees.

The Administrator's argument on "place of employment" is most difficult to comprehend as applied to the appellant's service shops. First he appears to argue (p. 26, footnote 8) that even where several buildings operated by an employer are located on the same premises, nonetheless they are not part of the same "place of employment" if one of the buildings is a self-sufficient unit performing operations independently of operations in the other buildings. A failure to integrate the operations thus, according to the Administrator, would defeat the Sec. 7(c) exemption for the non-integrated unit. But this can have no meaning here since, as both the appellees (Br. p. 7 *et seq.*) and the Administrator (Br. p. 8) argue so strenuously, all of appellant's operations are highly integrated.

Next the Administrator argues (Br. p. 30) that a service shop is not a "place of employment" where the appellant is engaged in processing sugar cane into raw sugar because it is used to service the transportation facilities as well as the mill. But if transportation is incident to milling, as the Administrator has contended, the repair of the transportation facilities is likewise so incident; and both of them are part of processing. This means that necessarily they take place in a "place of employment" where the employer is engaged in processing.

The "processing" of sugar cane contemplated by Sec. 7(c) is more than the operation of automatic machinery which grinds the cane and extracts its juices. "Processing" includes a series of operations, such as the hauling of the cane to the mill, the cleaning of the cane, the grinding of the cane, the repair of the processing and hauling machinery and the delivery of the raw sugar to the carrier. Each of these is just as indispensable and as much a part of sugar cane processing as the watching of gauges in the boiling house of the mill. Wherever such activities take place, therefore, they are performed in a "place of employment" where the employer is engaged in processing sugar cane with the result that all employees engaged therein are exempt under Sec. 7(c). This is also the answer to the Administrator's contention (Br. p. 25) that employees may not be exempt under Sec. 7(c), although their work is incidental or necessary to processing, because such work does not occur in the "place of employment" where the employer is engaged in actual processing. Operations incidental or necessary to processing are themselves processing and therefore take place in a "place of employment" where processing is carried on by the employer (Appellant's main br. pp. 53-54; R-1892 (Administrator's Br. pp. 44-45)).

E. The Sec. 7(c) exemption is not lost when work is performed while the mill is shut down for the annual period of repair and reconditioning.

1. *Maisonet v. Central Coloso* (D. P. R. 1942) 6 Labor Cases, par. 61,337, relied upon by the Administrator (Br. p. 32) as showing that the Sec. 7(c) exemption does not apply during appellant's off-season, is distinguishable. In the instant case, as pointed out in our main brief, pages 67-68, the stipulated facts are that the average number of man days of work performed in the mill during each 24 hour period during the off-season is 116 and that is precisely the same as the average number of man days of work performed in the mill during each 24 hour period of the grinding season. The employees at the mill work a 48 hour workweek both during the grinding season and off-season (R. 215). Thus, here, unlike the situation in the *Maisonet* case, the appellant's mill could not easily spread employment sufficiently during the off-season so as to avoid the necessity of overtime work.

2. Contrary to the Administrator's assertion (Br. pp. 32-33), the stipulated facts make it clear that appellant's off-season repair work is designed simply to insure the uninterrupted functioning of the mill (R. 210-213), and not, as in the *Maisonet* case, to safeguard appellant's capital investment and for the installation of improvements. The grinding season is limited only by the needs of mill maintenance, as the appellee union itself has said to a Congressional Committee (Appellant's Br. pp. 67, 93).

3. We agree with the Administrator (Br. p. 33) that the exemption applies during the week-end shutdown because the work at that time is concerned with keeping the mill operating and is closely related to the actual processing operation. But as we have shown, the same is true of the work performed during the off-season. If actual processing is not necessary to sustain the Sec. 7(c) exemption during the week-end shutdown, neither is it necessary to sustain such exemption during the off-season. The Administrator by his admission of the exemption during the week-end shutdown has himself refuted his unequivocal state-

ment (Br. pp. 31-32) that Sec. 7(c) applies only if at the time the employer is engaged in actual "processing".

4. The Administrator does not weaken the effect of admissions by him and the Secretary of Labor (Administrator's Br. p. 33) that the Section 7(c) exemption for sugar cane processing is a "52-week overtime exemption", by now asserting that such statement is based on the premise that sugar cane processing operations are being conducted during the entire year. Sugar cane is grown in Puerto Rico, Louisiana, Florida, and the Virgin Islands, as well as in Hawaii. Sugar beets are grown in the Rocky Mountain and North Central states area.¹⁴ In all these areas except Hawaii the operating season is only five or six months per year. See *Bowie v. Gonzalez*, 117 F. (2d) 11, 14 (Puerto Rico); 1944-45 *WHMan.*, pp. 643-644 (Louisiana); *Id.*, p. 1520 (beet sugar industry). In Hawaii, however, the operations take place the year around, except insofar as they are required to shut down for annual repairs (R. 136, 152, 210-212; Bulletin No. 926, U. S. Department of Labor, p. 64; Appellees' Br. pp. 6-7). Hawaii then is the only place in the United States which has year-around production. It must be assumed, therefore that Congress had Hawaii in mind when it granted a year-around exemption in Sec. 7(c) to sugar cane processing. See further appellant's main brief, pp. 65-68.

5. The Administrator contends (Br. p. 31) that denial of the exemption during the off-season is consistent with the legislative purpose of Sec. 7(c). He states (Br. p. 24, footnote 6, citing *Walling v. Swift*, 131 F. (2d) 249, 251), that the general purpose of Section 7(c) was to enable the employer to avoid the burden of overtime in those seasonal periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control. The *Swift* case, however, involved only a 14 workweeks seasonal exemption granted by Sec. 7(c) for

¹⁴ Agricultural Statistics, U. S. Department of Agriculture, 1947, pp. 89, 94, 95, 96, 97, 98-99 (Tables 117, 123, 125, 127, 128, 130). These statistics show that sugar cane and sugar beets are produced in large commercial quantities, insofar as the United States is concerned, only in the places specified in the text.

handling, slaughtering and dressing livestock. The purpose of Section 7(c) was necessarily different with respect to the industries granted year-around exemptions, such as the industry processing sugar cane into raw sugar, than it was with respect to the industries granted only a seasonal exemption.

III.

THE ADMINISTRATOR'S BRIEF DOES NOT DETRACT FROM APPELLANT'S CONTENTION THAT ANY EMPLOYEE APPELLEE, WHO IN A WORKWEEK PERFORMS SOME WORK EXEMPT UNDER SECTION 13(a)(6) OR SECTION 7(c) AND DOES NOT ENGAGE FOR ANY SUBSTANTIAL PART OF HIS TIME IN THE SAME WORKWEEK IN AN ACTIVITY WHICH IS NOT SO EXEMPT, IS EXEMPT FOR THAT WORKWEEK FROM THE OVERTIME PROVISIONS OF THE ACT.

1. The Administrator argues that by their terms, Sections 13(a)(6) and 7(c) "provide a very broad tolerance for activities which are not of a strictly agricultural nature" or processing character. On the other hand in the case of the other exemptions in the Act where he has permitted a tolerance of non-exempt work, the exempt occupation is designated only by an undefined word or phrase¹⁵ (Br. pp. 34-35, 38-41).

The Administrator has apparently forgotten in this part of his brief the argument which he made earlier (Adminis-

¹⁵ One of the exemptions to which the Administrator has accorded a 20% tolerance of non-exempt work is the Section 13 (a)(5) fishing industry exemption (Appellant's Br. p. 94). To refer to such exemption as one designated by simply an undefined word or phrase is absurd in view of the fact that Section 13(a)(5) exempts as follows:

"any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof."

trator's Br. pp. 7-34) with respect to the Sections 13 (a)(6) and 7(c) exemptions. Far from according to such exemptions the breadth to which he now alludes, he would so narrowly construe the exemptions as to make them wholly unworkable and unusable for most farmers and farms and for most processors of agricultural commodities.

If in fact, as the Administrator now argues, Sections 13 (a)(6) and 7(c) by their terms provide a very broad tolerance for activities which are not of a strictly agricultural or agricultural processing nature, then all the activities of appellant, which we have shown in our brief are necessary and indispensable facets of its growing and processing operations, come within the statutory language exempting "agriculture" or "processing". If, on the other hand, Sections 13(a)(6) and 7(c) do not themselves provide the tolerance to which the Administrator alludes so that in performing the operations necessary and indispensable to growing of crops and processing them, the exemption is lost, there is the same justification for allowing such tolerance with respect to Sections 13(a)(6) and 7(c) as with respect to any other exemption in the Act. Such justification as the Administrator recognizes (Br. pp. 40-41) is that many employees in occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties, which do not strictly fall within the literal language of the exemption provision. A failure to allow some tolerance therefore would result in so widespread a denial of the exemptions as to substantially defeat the Congressional intention in enacting them.

2. A number of the authorities cited by the Administrator in this part of his argument are not in point. Thus on page 35 of his brief he cites cases involving exemptions granted to "any employee" of particular types of employers, e.g. "any employee" of a retail establishment, where the employer engages in two wholly separate businesses, one within the exemption and one outside it. For example, in *Davis v. Goodman Lumber Co.* 133 F. (2d) 52 (C. C. A. 4) the employer operated a retail lumber yard and a manufacturing business wholly extraneous to the retail lumber business. The Court held the retail establishment exemption inapplicable to employees engaged in the manufactur-

ing business. The situation here is different since appellant is engaged in just one type of business and nothing it does is extraneous to its production or processing of sugar cane.

3. Other authorities cited by the Administrator (Br. p. 37) fully support appellant's position. *Thus Anderson v. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C. C. A. 2) involved the Sec. 13(a)(3) exemption for seamen. It appeared that 95% of the employees' duties were non-exempt. The court properly regarded this as a substantial amount of non-exempt work and held the exemption inapplicable. However, it recognized as sound the principle that only if the employee engaged in a substantial amount of non-exempt work would he lose the exemption. The Administrator in his brief (p. 41) (see also appellant's main Br. p. 94) affirms this principle as applied to Section 13(a)(3).¹⁶

Respectfully submitted,

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¹⁶ The Administrator cites (Br. p. 37) *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (C. C. A. 5), as authority for the proposition that an employee engaged as a telephone operator within the meaning of Section 13(a)(11) is not exempt if he performs other duties of a non-exempt nature. While the case does so hold, the Administrator's citation thereof is surprising since the holding is contrary to the Administrator's allowance of a 20% non-exempt work tolerance for such switchboard operators (Appellant's Br. p. 95), a tolerance which the Administrator continues to justify as necessary to give substance to Section 13(a)(11) (Administrator's Br. p. 41).

APPENDIX A

METHODS OF CANE TRANSPORTATION ON HAWAIIAN PLANTATIONS.

“Each plantation has adopted that method, or combination of methods [of transportation] best suited to its local conditions. The methods are: (a) Railroads, with both permanent and portable tracks, (b) flumes, (c) tractors pulling wagon trains, (d) cableways, and (e) motortrucks. The general trend is toward very large motortrucks, but plantation railroads still carry the bulk of the Hawaiian cane from the field to the mill”. *Bulletin No. 926, U. S. Department of Labor*, p. 45.

APPENDIX B.

ADMINISTRATOR'S RELEASE, TRANSCRIPT OF PROCEEDINGS OF INDUSTRY COMMITTEE FOR SUGAR AND RELATED PRODUCTS INDUSTRY, AND OPINION LETTERS OF WAGE AND HOUR DIVISION DEALING WITH APPLICATION OF SECTION 13(a)(6) TO CANE TRANSPORTATION.

1. *Release G-322 published incident to Administrator's approval of a wage order for the Sugar and Related Products Industry (8 F. R. 7098).*

“No objection to the definition of the Sugar and Related Products Industry was offered by any interested party at the public hearing before Major Campbell. Objection was, however, raised in a brief filed with the Committee by the American Sugar Cane League of the U. S. A., to that part of the definition which reads: ‘The production of any products covered under this definition shall be deemed to begin with the loading of the raw materials at the farm.’ Objection to this language was also voiced by Mr. Ernest W. Greene, Washington, D. C., a representative of the employers on the Committee. A proposed amendment of the above language was offered on behalf of the Hawaiian Sugar Planters Association. I have carefully considered these objections and suggestions upon the evidence in the record. Any apprehension that the language in question may be regarded as including agricultural employees who are exempt from the Act's minimum wage provisions under Section 13(a)(6) is hardly justified in view of the fact that Administrative Order

No. 162 appointing Industry Committee No. 50 and defining the Sugar and Related Products Industry, specifically excepted from the scope of the Committee's jurisdiction 'employees exempted by virtue of the provisions of Section 13(a) * * *.' ”*

*“Administrator's Exhibit 1-A, paragraph 4. Whether or not a particular employee engaged in loading or transporting sugar cane from a farm to a mill is to be regarded as 'employed in agriculture,' as agriculture is defined in Section 3(f) of the Act, and hence exempt from the minimum wage provisions of the Act under Section 13(a)(6), is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law. See Interpretative Bulletin No. 14, paragraphs 1-13. See also the decision of the Circuit Court of Appeals for the First Circuit in the case of *Calaf (Collazo) v. Gonzalez*, 127 F. (2d) 934, where it was decided that the Section 13(a)(6) exemption was inapplicable to employees engaged in transporting sugar cane from their employer's farm to their employer's sugar mill, even though the cane was grown by the employer of the employees in question. See also the decision in the case of *Gonzalez v. Bowie*, 123 F. (2d) 387 (C. C. A. 1), to the effect that the Section 13(a)(6) agricultural exemption was inapplicable to employees transporting sugar cane of independent growers to their employer's sugar mill.”

2. *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943.*

“MR. GREENE: May I ask a question at this time, Mr. Chairman?

“CHAIRMAN KREPS: Surely.

“MR. GREENE: Greene is my name. I wish to speak to the point of this brief to the extent of its comment on the definition. My comments have nothing to do with Mr. Winston's. In the second paragraph of the definition contained in the Administrative Order it says: 'The production of any products covered under this definition shall be deemed to begin with the loading of the raw materials at the farm.' That definition in the light of the Interpretative Bulletin No. 14, issued some time ago by the Wage and Hour Division, was a little confusing to many of us, not as an argumentative or technical point but merely as a matter of clarity and of knowing where these wages which we are now discussing are to begin, and in the economic data we find

that the case of *Calaf et al. vs. Gonzales et al.* is cited as authority for the definition, which would deny exemption to any employees even of the owner of a farm engaged in transporting sugar cane from the farm to the factory on the ground of the decision in that Calaf case insofar as the layman can read it. That decision was based upon conditions peculiar to Puerto Rico, an area not covered directly by the Act, to which the Act applies only when specially invoked for it by a special Committee, not a Committee such as this, and conditions which do not obtain generally throughout certain other sugar cane producing areas. We find a recognition of that by the Court when the decision contains the following: 'We would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located on the farm.'

"Now without laboring any lengthy discussion, it is customary in the territory of Hawaii for a sugar cane farm to be a large scale farming unit complete with a processing plant for grinding the sugar cane and producing raw sugar located at some convenient point on the farm with the farm containing a transportation system for serving that, the fields and the plant, and the situs of the employment of the workers in the heart of the transportation system is very decidedly on the farm. Now I realize that nothing that is put out by way of definition and nothing that I or anyone else on this Committee can say can change the statute or the decision of a court, but I do wish to point out that this definition, which has been set up to guide us as to where these wages which we are discussing would apply, seems to me to ignore the language of the court which applies directly to conditions which exist in many cases in Hawaii and I believe that the distinguished member from Louisiana will agree that it applies also to many cases in Louisiana where you do not have the separate farm property, separate mill property, visualized in a court decision that apparently existed in that case. I wish to bring to the attention of the Committee that that definition seems to me to be out of order.

"CHAIRMAN KREPS: Thank you, Mr. Greene. Does anyone else wish to speak to this particular point?

"MR. SHISHKIN: Mr. Chairman.

"CHAIRMAN KREPS: Mr. Shishkin.

"MR. SHISHKIN: It seems to me that the brief just discussed raises a question of definition and it might be useful for the Committee to hear a representative of

the Wage and Hour Division read the present definition and also indicate to the Committee the extent of coverage of the Fair Labor Standards Act in terms of the statutory minimum wage application to the industry at the present time so that we will have a clear idea as to the extent to which the Act applies.

* * * * *

“CHAIRMAN KREPS: The brief and certain legal aspects have been called into question and I suggest we therefore turn to the staff. May I ask Dr. Klingenfiedt to speak to this point?

“MR. KLINGENFELD: Mr. Chairman, I should like at this time to refer the matter to our economist, Mr. Hughes, who will take up the definition in connection with his study, and also will speak to the point raised by both Mr. Greene and Mr. Shishkin. If that is all right with you, I should like to refer the thing to Mr. Hughes in his general presentation of a report.

“CHAIRMAN KREPS: Mr. Hughes will explain the economic report, of which all of us have been given a copy.

“MR. HUGHES: First with respect to the definition, the intention behind this definition was to put together in one industry as many competitive products and essential processes as possible so as to bring them to the attention of the Industry Committee with dispatch. There is no question but what refined sugar and beet sugar are competitive, nor is there any question but what raw cane sugar and beet sugar are competitive even though raw cane sugar has to be further processed before being used. The processing of sugar cane into raw cane sugar is competitive with the processing of sugar cane into syrup inasmuch as both processors have to compete for sugar cane in some areas, and in those areas where sugar cane syrup manufacturers and raw sugar manufacturers are located within the same vicinity they have to compete for labor. All the syrups covered herein are competitive with sugar to the extent that they are used as substitutes for sugar, and maple syrup, of course, is covered because of its competition with sugar cane syrup and sorgo syrup.

“With respect to the operations covered, the intention behind the definition is to cover all those which were not otherwise exempt. The definition does not and cannot cover any operations which are specifically exempt from the wage provisions of the Act. Thus, any operations which are now exempt as being agricultural under Section 13 (a) (6) of the Act would remain

exempt and any operations which now get the benefit of the area of production exemption, Section 13 (a) (10), would also remain exempt. The establishments which would be primarily covered by this definition are cane sugar refineries, raw sugar factories, syrup manufacturers, and beet sugar factories. As indicated in the report, these establishments are pretty generally distributed over the entire United States, with certain types of establishments being centralized in certain areas, as, for example the manufacture of raw sugar in Louisiana, Hawaii, and Florida, and beet sugar factories being located principally in the Middle West and Far West.

* * * * *

“CHAIRMAN KREPS: Any other questions any of the committee members would like to ask of Mr. Hughes? I am wondering whether Mr. Brown might give us some—returning to the point of the definition—whether Mr. Brown would like to give us his views on the question of definition as stated in the paragraph which has been challenged by some members of the committee.

“MR. BROWN: I want to say a few words on that. As Mr. Hughes stated at the outset, any definition in any case including this one is subject to whatever exemptions may already exist in the act, and insofar as there is an exemption in 13(a)(6) of the act for agriculture, why of course any definition of this industry would be subject to that exemption.

“Now, that exemption, of course, exempts from minimum wages and overtime, activities which are deemed agriculture. Now, however the act does not go into great detail as to what activities are deemed agriculture and those which are not, and the Interpretative Bulletin No. 14 that was mentioned is merely the Division’s opinion of what the courts will consider to be agriculture; and as a matter of fact there have been a few cases on that point, not very many, but some important ones, so that the thing to bear in mind is that there is no danger of fixing a minimum wage or anything that should not be fixed, should not be covered under this definition because the courts will eventually, and have already begun to indicate which activities on the farm and off the farm, are to be deemed agriculture. I don’t think that we here in the Wage and Hour Division are prepared to go into any detail now, or could, even if we wanted to, go into detail to indicate what activities will be deemed agriculture and which will not. That is up to the courts.

“With respect to that particular point about the definition, namely the second paragraph, and that the production or any production covered under this definition should be deemed to begin with the loading of raw materials at the farm, why insofar as any of that loading will be held to be deemed part of farming and part of agriculture, of course that loading by a farmer or on a farm may be held by the courts to be agriculture and outside of the scope of this definition; but insofar as the courts may hold and might hold that certain loading by a mill of raw materials may be deemed to be not agriculture but merely part of grinding, why then it will be covered, but as I say that is something that will depend upon two things, the facts in each particular case and the courts will have to go into the facts to determine whether or not the loading is incidental to agriculture or incidental to milling and then upon those facts the courts will tell us whether it is to be exempt under 13(a)(6) or not.

“I think that is all I can tell you right now because it isn't for the Division to give a ruling or binding interpretation as to the definition.” *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for Sugar and Related Products Industry held January 5, 1943, pp. 9-12, 12-14, 24-26.*

3. *Exchange of letters with Mr. Paul E. Guillot, Paincourtville, Louisiana.*

a. *Letter from Mr. Guillot to the Wage and Hour Division.*

DUGAS & LEBLANC, LTD.
Manufacturers of
Westfield Sugars and Molasses

Paincourtville, La.
Sept. 29th, 1942

U. S. Department of Labor,
Wage and Hour Division,
Washington, D. C.

Gentlemen:

I am General Bookkeeper for the above firm, having been in their employment for the past twenty years. I am perfectly satisfied and fully desire to have my employer protected in every respect.

I would appreciate if you will assist me in giving me a definite ruling on the hour provision of the act with respect to our clerical force.

These people are Cane Farmers, Manufacturers of raw sugar and blackstrap molasses all moving to refineries within the state. Also a Narrow Gauge Railroad hauling our cane, and independent growers cane, but we bear the expense of the operation. They also operate in connection with their business, a retail store. The entire accounting record is kept and the work performed by the same office crew. Now, according to our interpretation of Bulletin No. 14, we arrive at this conclusion :

Farming-Agriculture Exempt from hour provision

Processing Raw Sugar Do.

Retail Store Do.

Are we correct? Would the clerical help be also exempted?

My reasons for checking up on this and getting a specified ruling is that help is getting scarce, and it may be that we will have to put in longer hours, especially, during the harvesting and processing season.

Please advise promptly, and oblige,

Very truly yours,

/s/ PAUL E. GUILLOT

b. Letter from Mr. William B. Grogan for the Administrator to Mr. Guillot.

165 West 46th Street
New York, New York

SOL:JHS:DS

November 26, 1942

Mr. Paul E. Guillot
Dugas & LeBlanc, Ltd.
Paincourtville, Louisiana

Dear Mr. Guillot:

This will reply to your letter of September 29 relating to the application of the Fair Labor Standards Act of 1938 to the operations of a sugar mill in which you are general bookkeeper. The original of your letter was sent directly to this Division; one copy was forwarded by Senator Allen J. Ellender of your State; and one copy was forwarded by Congressman James Domengeaux.

Both Senator Ellender and Congressman Domengeaux referred their copies of your letter to this Division for reply.

You state that your employers are cane farmers and manufacturers of raw sugar and blackstrap molasses, all moving to refineries within your State. They operate a narrow gauge railroad hauling both their own cane and the cane of independent growers. They also operate in connection with their business a retail store. The entire accounting record is kept by the same office crew. You conclude that the employees engaged in farming activities, processing of raw sugar and the retail store are exempt from the hour provisions of the Act. You ask if the clerical help would be exempt.

It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of section 13(a)(6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf v. Gonzalez*, 127 F. (2d) 934 (C. C. A. 1) indicates that the mere fact that owners of sugar cane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill "incident to farming" and therefore exempt under Section 13(a)(6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13(a)(6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin 14 will enable you to determine which of your employer's employees are engaged in "agriculture" and therefore within the scope of the section 13(a)(6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act.

Section 13(a)(2) of the Act contains an exemption from both its minimum wage and overtime provisions for: "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Your employer operates a retail store in connection with its business. An establishment will not qualify for exemption under section 13(a)(2) unless more than 50 percent of its dollar volume of sales is in intrastate commerce. The exemption will also be defeated if its nonretail selling is substantial. For enforcement purposes, the Division will ordinarily consider the nonretail selling of an establishment to be substantial if the gross dollar volume of nonretail sales constitutes more than 25 percent of the

gross receipts of the establishment. If this store meets the two tests above and is open to and frequented by the general public, it is probably a retail establishment within the meaning of section 13(a)(2). If so, employees solely employed in the retail store are exempt from the wage and hour provisions of the Act in any weeks in which they are employed solely in the retail establishment.

As to employees outside the scope of the two exemptions referred to above, consideration should be given to the application of the section 7(c) exemption. This section exempts from the overtime, but not minimum wage, requirements of the Act, employees processing sugar cane into sugar (but not refined sugar) in any place of employment where their employer is so engaged. In the ordinary case, the making of blackstrap molasses comes within the scope of this exemption. To be within the scope of this exemption, an employee must be employed in the establishment where operations exempt under this section are performed. Truck drivers who carry raw materials to the establishment, or who transport away from the establishment goods upon which exempt operations have been performed, may be considered as working in the "place of employment" within the meaning of this section.

You state that the accounting work related to all of your employer's operations are performed by the same office crew. Bookkeeping and other clerical employees may, in proper circumstances, be exempt under sections 13(a)(6), 13(a)(2) or 7(c). As to all your employees, the doing in a workweek of any work exempt only from the overtime provisions of the Act will require compliance with the minimum wage provision for all hours worked in the week. And the doing of any work exempt from neither the minimum wage nor overtime requirements will require compliance with both provisions for all hours worked in that week.

The minimum wage now applicable in the sugar industry is 30 cents an hour. However, the Administrator has recently appointed an industry committee for the "Sugar and Related Products Industry." Under the provisions of the Fair Labor Standards Act, this industry committee may recommend to the Administrator for the sugar industry a minimum wage rate not to exceed 40 cents an hour. If such a recommendation for a rate in excess of 30 cents is approved by the Administrator, it will become effective on the date prescribed by him. If the Administrator approves such a wage order for the sugar industry, the usual public notice will be given in advance of its effective date.

If you have further questions, information may be obtained from our New Orleans, Louisiana office located at 916 Union Building in that city.

Very truly yours,

/s/ WILLIAM B. GROGAN
Acting for Administrator
 L. METCALFE WALLING

4. *Letter from the Deputy Administrator to Mr. James Marshall, Director, Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture.*

SOL:EGT:MFS (Oct 9 1948)

Mr. James Marshall
 Director, Sugar Branch
 Production and Marketing Administration
 U. S. Department of Agriculture
 South Agriculture Building
 Washington, D. C.

Attention: Mr. Harry Simpson

Dear Mr. Marshall:

This is in reply to Mr. Simpson's telephone request of September 25, 1946, to Mr. Robert G. Grenewald, for information concerning the status under the Fair Labor Standards Act of truck drivers in Puerto Rico who haul sugarcane from farms to sugar factories.

I understand the A. A. A. office in Puerto Rico is holding a hearing in San Juan, Puerto Rico, on October 15, 1946, for the purpose of determining the wages of employees under the Sugar Act. I also understand that it is not the purpose of this hearing to cover truck drivers who are subject to a wage order under the Fair Labor Standards Act, but that where truck drivers are not so covered, an attempt will be made to establish a minimum wage for their employment. For the guidance of the A. A. A. office in Puerto Rico you desire a general statement concerning the type of truck drivers covered by the Fair Labor Standards Act and the wage orders to which they are subject when hauling sugarcane from farm to sugar mill or centrale.

As you know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including occupations or processes necessary to such production. Employees so engaged must be paid at least the applicable mini-

imum rates provided in the Act (which may not exceed 40 cents per hour) and not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless specifically exempted from one or both of these requirements by some provision of the Act. While a minimum rate of 40 cents per hour has been generally applicable in all industries on the continent since July 1944, minimum rates applicable in Puerto Rico under sections 5(c) and 6(c) of the Act vary in the different industries.

Truck drivers who are engaged in hauling sugarcane from a farm to a centrale for production into sugar or other commodities which goods or any unsegregated part thereof are expected to be shipped in interstate commerce directly or indirectly, in the same form or after further processing, are generally covered by the Act. On the other hand, where the sugarcane is being processed for purely local consumption and is not expected to leave Puerto Rico, either as sugar or as an ingredient of some other product, truck drivers engaged in transporting the cane from farm to centrale would not be covered by the Act.

An employee who is covered by the Act may be exempt, however, from its minimum wage and overtime provisions, as indicated above. Thus, section 13(a)(6) exempts from the Act's minimum wage and overtime requirements employees engaged in agriculture, which, as defined in section 3(f), includes, among other things, "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including, * * * delivery to storage or to market or to carriers for transportation to market." Truck drivers transporting cane on a farm as an incident to the farming operations on that farm would, of course, be exempt. However, since the truck drivers deliver the cane to a mill, I assume that this transportation involves working off the farm, in which case the transportation of the sugarcane would be exempt under section 13(a)(6) only if performed by employees of the farmer, as an incident to the farming operations of the farmer. In the ordinary case, an employee of a farmer who is employed by the farmer to haul the farmer's own cane to a mill or factory would be exempt under section 13(a)(6). Employees engaged in such transportation are exempt from the Act's minimum wage and overtime provisions and hence are not subject to any wage order issued under the Act.

There are situations in Puerto Rico, however, where the farm and centrale are under common ownership. The mere fact that the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the

farm to the mill is "incident to farming" and therefore exempt under section 13(a)(6). In such a situation, it becomes a question of fact whether the truckers are employed by the plantation in work incidental to farming operations, so that they would be exempt under section 13(a)(6), or whether they are employed by the centrale in work incidental to milling operations which would not be exempt. In deciding this question the Divisions have adopted the tests used by the court in *Calaf Collazo v. Gonzalez* 127 F. (2d) 934. Thus, where the employees are on the farm pay roll, report to the farm for instructions daily and at the end of the day, are generally supervised from the farm, perform agricultural work on the farm, and where the trucks are stored and maintained on the farm—these are factors indicating that the employees are performing work which is an incident to the farming operations. On the other hand, where the employees are on the mill pay roll, are supervised from and report to the mill, and perform other work at the mill, these factors would indicate that the work of the employees is incidental to the milling operations.

Where truck drivers are employed by sugar factories or centrales, as distinguished from employment by the farmer, to transport cane from farm to factory, their work, under the decisions of the courts and the interpretations of the Divisions, is incidental to milling and not farming operations and is, consequently, not exempt under section 13(a)(6). Also, where a farmer transports another farmer's cane from field to centrale, such transportation operations are not within the 13(a)(6) exemption. Neither would transportation to the centrale be exempt under section 13(a)(6) if performed by independent contractors. The work of all these truckers, if within the coverage of the Act, would be subject to applicable wage orders.

The question of which wage order applies to truck drivers subject to the Act's minimum wage provisions and who are engaged in hauling cane from field to factory would depend upon the facts in each particular situation. Without a complete knowledge of such facts I cannot advise you specifically on the point. In general, however, when the transportation is performed by a trucking firm or company which holds itself out to the general public to engage in the transportation for compensation of property in commerce or of property necessary to the production of goods for commerce, the employees would be subject to the wage order for Railroad and Property Carrier Industry, *provided* that: (a) the company is not directly or indirectly owned or controlled by a company primarily engaged in manufacturing or other non-transportation activity, *and* (b) does not per-

form any transportation functions for such company. The wage rate under this wage order is 20 cents an hour. Where trucking employees of a centrale transport cane from field to mill, such activities are covered by the wage order for the Sugar Manufacturing Industry, which prescribes a minimum wage rate of 35 cents an hour. Likewise, employees of a trucking firm owned or controlled by a centrale and which is primarily engaged in hauling for the centrale would also be subject to the Sugar Manufacturing Industry wage order. Where an independent trucking firm does not haul for the general public but intentionally limits its services to a few centrales, refusing orders from other members of the public who might require its services, its operations would generally be covered by the wage order for the Communications, Utilities and Miscellaneous transportation Industries, which prescribes a wage rate of 40 cents an hour.

I trust that this information will be of assistance to you. However, if the A. A. A. office in Puerto Rico needs any further information concerning this matter, I would suggest that it communicate with Mr. Kretzinger of the Department's Puerto Rican office, who is fully informed on all the problems involved.

Very truly yours,

THACHER WINSLOW
Deputy Administrator



